REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench,

DURING

MICHAELMAS, HILARY, AND EASTER TERMS,

IN THE

THIRD AND FOURTH GEO. IV.

BY

JAMES DOWLING, Esq. OF THE MIDDLE TEMPLE,

AND

ARCHER RYLAND, Esq. OF GRAY'S INN,

BARRISTERS AT LAW.

VOL. II.

WITH AN INDEX,

AND

TABLE OF PRINCIPAL MATTERS.

LONDON:

Printed by S. Brooke, Paternoster Row,

FOR S. SWEET, 3, CHANCERY LANE; R. PHENEY, INNER TEMPLE LANE; A. MAXWELL, 21, R. STEVENS AND SONS, 39, BELL YARD; AND R. MILLIKEN, DUBLIN.

1823.

Uttarpara Jaykrishna Public Library
Accn. No. 27172 ... 17/7/2000

JUDGES

OF THE

COURT OF KING'S BENCH,

During the Period comprised in this Volume.

Sir Charles Abbott, Knt. C. J.
Sir John Bayley, Knt.
Sir George Sowley Holroyd, Knt.
Sir William Draper Best, Knt.

Sir Robert Gifford, Knt. Attorney-General.
Sir John Singleton Copley, Knt. Solicitor General.

A TABLE OF THE CASES REPORTED IN THE SECOND VOLUME.

The Cases printed in *Italics* are from MS. Notes.

ERRATA.

Page 25, line 5, from top of margin, dele "*B.*" and read "*C.*"
38, 3, from top of margin, dele "*in fee*" and read "*for life.*"
73, 9, from top of margin, dele "*or*" and read "*of.*"
85, 7, from top of margin, dele "*as*" and read "*his.*"
161, 4, from bottom of margin, for "*defence*" read "*fence.*"
369, 10, from top, for "*Ward* v. *Hughes,*" read "*Ward* v. *Hunter*, 6 Taunt. 210."
398, 24, from top of margin, dele "*to.*"
424, 20, for "*Anonymous*" read "*Berry* v. *Pratt.*"
427, 2, from top, for "*Gloucestershire*" read "*Oxfordshire.*"
565, 2, from bottom of margin, for "*c.* 37." read "*c.* 87."
589, 10, from bottom of margin, for "1721" read "1821."

CASES



ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

MICHAELMAS TERM,

IN THE THIRD YEAR OF THE REIGN
OF GEORGE IV.

1822.

FARRANT *v.* THOMPSON (*a*).

The machinery of a mill is part of the freehold, and cannot lawfully be removed by the tenant. Where the owner of a mill demised it to a tenant under agreement for a lease for thirty years, and the tenant clandestinely dismantled the mill of the machinery, which in its removal was seized by the sheriff in execution, and sold under his authority to a *bonâ fide* purchaser:—Held, that the landlord might maintain *trover* against such purchaser, though the tenant's term was unexpired.

TROVER for the machinery of a mill. At the trial before *Abbott*, C. J., at the *Middlesex* Sittings after last *Easter* Term, it appeared, that the plaintiff was the proprietor of a corn-mill at *Cudham*, in *Kent*, which he had purchased in *July*, 1820, of one *Richards*, who continued in possession thereof as tenant to the plaintiff, under an agreement for a lease of thirty years, but which lease was never in fact executed. *Richards* becoming irregular in his payments of rent, the plaintiff, in *June*, 1821, put in a distress upon the premises, but upon application by *Richards*, he allowed him time, and a man remained in possession until *August*, when *Richards* succeeded in putting the latter out by stratagem, and then proceeded to dismantle the mill, the entire machinery of which was found to have been

(*a*) The MS. of this case having been mislaid when the last number went to press, it is thought right to insert it here.

1822.
FARRANT v. THOMPSON.

removed, and the mill deserted, when possession was regained by the plaintiff. The property thus removed was, in the course of its transit to *Grays*, in *Essex*, (where the defendant, who by previous private contract had agreed to purchase it of *Richards*, lived) afterwards seized by the sheriff under an execution at the suit of a third person, and sold under his authority by public auction, when the defendant became the purchaser of the articles sought to be recovered by this action. On the part of the defendant two objections were taken, first, that as the goods had been sold bonâ fide under legal authority by the sheriff, it must be considered as a sale in market overt, and could not be impeached as against the purchaser, but that the action should have been brought against the sheriff; and, second, that as *Richards* was tenant of the mill under an agreement for a lease, the plaintiff as landlord could not maintain *trover* for the goods; his only remedy being *case* for the injury to his reversion; and on these grounds it was contended, that the plaintiff must be nonsuited. The learned Judge, however, directed the jury to find a verdict for the plaintiff, giving the defendant leave to enter a nonsuit, if the Court should be of opinion that these objections were available; and

Scarlett now moved for a rule nisi accordingly, and contended, on the first point, that it had been repeatedly decided, that where goods are sold under the authority of the sheriff, he was the only proper defendant in an action by the landlord, and that the sale, as against a bonâ fide purchaser, without notice, could not be impeached; *Doe* v. *Thorn* (a), *Manning's case* (b), and *Goodyer* v. *Junce* (c); and, on the second point, that as the goods in question had been in the possession of *Richards*, as tenant to the plaintiff under a demise, and as he was entitled to the use of them during the term, trover would not lie; *Gordon* v.

(a) 1 M. & S. 425.
(b) 8 Co. Rep. 191.
(c) Yelv. 179. See *Cole* v. *Davies*, 1 Ld. Raym. 724.

Harper (*a*). It had been contended, at the trial, that the present was similar to the case of a tenant cutting down trees, for which, when severed, the landlord might maintain trover against any third person; but in the first place trees are in fact never demised to the tenant, and in the next, the articles in this case could not be considered as fixtures, or as part of the freehold; they were mere furniture, and the possession of them was wholly gone from the landlord; they would pass to the executor, and not to the heir; and therefore the argument did not apply. This distinction was expressly drawn by *Lawrence*, J. in the case of *Gordon* v. *Harper* (*b*), and upon that authority it was clear that the present form of action was not maintainable.

ABBOTT, C. J.—I am of opinion that there is no foundation for either of the objections taken in this case, and therefore that we ought not to grant the rule to enter a nonsuit. With respect to the first objection, it is by no means borne out by the cases which have been cited in support of it. The only case indeed which appears to me to bear upon the present, is that of *Doe* v. *Thorn*, and in that Lord *Ellenborough* states, as the ground for entering the nonsuit, that the judgment had not been set aside. The second objection, I think, does not apply here, although it certainly prevailed in the case of *Gordon* v. *Harper*, and the distinction I draw is this; in that case the goods were personals, and the possession of them was wholly divested from the landlord by the demise to the tenant; but here the goods are in the nature of realties, and go with the inheritance. It has been decided in *Elwes* v. *Maw* (*c*), that a cider-mill and its appendages pass to the heir, and not to the executor, and I can see no reason why a different doctrine should be entertained respecting a corn-mill. I also think now, as I certainly thought at the trial, that these goods, when separated from the mill, would, as in the case of trees cut

(*a*) 7 T. R. 9. (*b*) 7 T. R. 9 (*c*) 3 East, 28..

1822.

FARRANT v. THOMPSON.

down by a tenant, revert to the landlord, and upon that principle, trover is maintainable for them by the landlord. Wheels and spindles can scarcely be considered as furniture, and it was proved that articles of that description were separated from the mill, and removed in the night. As regards the justice of this case, no man can entertain a doubt, and I am of opinion that the law will authorise us in holding, that the plaintiff is entitled to the remedy he seeks in this particular form of action, and against this particular defendant. The sheriff is a wrong-doer in taking the property of the plaintiff, and therefore the defendant could not under him acquire any title to it.

BAYLEY, J.—It seems to me that the possession in this case was never wholly out of the landlord, and that the use of the machinery only, not the machinery itself, was demised to the tenant. As such, it is quite clear that the plaintiff might have stopped the goods if he had found them, in transitu, and I think he is equally entitled to recover them in an action of trover against a purchaser. In the case of *Gordon* v. *Harper*, the goods were merely personals, and remained in the actual possession of the lessee at the time when the seizure was made; but here the goods were clearly a part of the inheritance, and within the rule applying to the case of trees cut down by a tenant. This is not like the case where the removal of the goods is temporary or for an honest or justifiable purpose; and I think we should be doing violence to the law if we were to hold that this action was not maintainable.

HOLROYD, J.—I am of the same opinion. The goods in this case were part of the freehold, and the use of them alone was demised to the tenant. They were chattels real, and as such they were leased. They were in law strictly a part of the mill itself, and the tenant had no dominion over them so as to make them personal chattels; he could only

1822.

FARRANT v. THOMPSON.

use them in statu quo they existed when demised to him. So it is in the case of a dwelling-house demised, if the tenant pulls it down, the materials and fixtures then revert to, and are the property of the landlord; so it is in the case of growing trees; and so likewise I think it is here. The wrongful removal of the goods by the tenant, had the immediate effect of terminating his tenancy, and his interest in the chattels, and the landlord became entitled to recover them from any person in whose possession he could find them.

BEST, J., concurred.

Rule refused.

Wednesday, Nov. 6.

DOE, d. TEVERELL v. SNEE.

Service of a declaration in ejectment on the servant of the tenant in possession, with a subsequent acknowledgment from the attorney of the latter, that the declaration had been received, is sufficient for judgment nisi against the casual ejector.

ABRAHAM moved for judgment against the casual ejector on an affidavit of service of the declaration in ejectment upon the tenant in possession, by leaving it with a servant of the latter; the affidavit going on to state that the deponent had afterwards seen and conversed with the attorney of the tenant in possession, who acknowledged that he had received the declaration.

The Court, upon this affidavit, granted a rule nisi for judgment, which was afterwards made absolute without opposition.

1822.

Wednesday, Nov. 6.

MOODY and others, Assignees of BELL, a Bankrupt, *v.* SPENCER, Gentleman, one, &c.

A town agent has no lien for the general balance due to him from a country attorney, upon the money of a client of the latter, coming to his hands in a cause in which he acts as the town agent. But *quære*, whether he has not a lien for his agency in recovering the money in the particular cause.

ASSUMPSIT for money had and received. At the trial before *Graham*, B., at the last Assizes for the county of *Lincoln*, it appeared in evidence that the defendant, being town agent of Mr. *Baldwin*, an attorney in the country, had received a sum of money due to the bankrupt from a person named *Wilson*, who had been sued by *Baldwin*, on the retainer of the bankrupt before his bankruptcy. The money was received by the defendant in *London*, after the act of bankruptcy was committed, and he refused to pay it to the assignees, on the ground that he had a lien upon it for a general balance due to him from *Baldwin*, as town agent of the latter in that and other causes. It was objected at the trial, that the action would not lie against the defendant, there being no privity between him and the assignees, to whom *Baldwin* alone was liable. The learned Judge, however, over-ruled the objection, and the plaintiffs had a verdict, with liberty to the defendant to move the Court.

Denman, C. S., now moved for a rule to shew cause why a nonsuit should not be entered, or a new trial granted, and contended that the defendant had a lien upon the money for the general balance due to him for business done as town agent for *Baldwin*, the country attorney. The money in question was received by the defendant simply as agent for *Baldwin*, without any specification of trust for the assignees. Between him and the assignees there was no privity of contract, and therefore as against him they had no remedy. The original suit was carried on, and the money recovered by his means, and at his expence, and it seemed but reasonable that he should have a lien upon the proceeds not only for the expence and labour so bestowed,

but also for the general balance in respect of other business done for *Baldwin*, his principal. If this could not be treated as money had and received to the use of the assignees, it was quite clear that the defendant was entitled to judgment of nonsuit. He cited *Ward* v. *Hepple* (a), as an authority to shew that an agent in town has a lien upon papers in his hands for what is due to him as agent in the cause from the solicitor in the country; and he insisted, that in principle, there was no difference between money and papers in the hands of the agent.

Abbott, C. J.—The case cited seems to be no authority on this point. That was entirely a question between the town agent and the solicitor in the country. Here the question is between the agent and the party for whom he has received the money. The assignees of the bankrupt claim this as money had and received to their use for the benefit of the bankrupt's estate, and if the bankruptcy had not taken place, it is quite clear that this would have been money received to the use of the bankrupt, but the bankruptcy intervening, the title of the assignees accrues. If the case is put upon the question, whether the defendant has a right to keep this money in respect of a claim which he has upon the bankrupt, the argument is clearly against the defendant; and I do not see that the intervention of *Baldwin* makes any difference in the case, because the latter and the defendant must be considered as standing in the same situation. It does not appear to have been suggested at the trial that the defendant was entitled to any reduction of the damages in respect of his expences and trouble in recovering this money; but he appears to have rested his case on a claim of lien upon this money for the general balance due from *Baldwin*, as his town agent. If by law the defendant is entitled to a lien upon this money for the expences incurred by him in the particular suit in which it was recover-

(a) 15 Ves. 297.

1822. Moody v. Spencer.

ed, that is a different question, and may be the ground of an application of another kind; but at present no such application is presented, nor does it appear that the subject was introduced at the trial. I am of opinion that the defendant has no lien on the money for the general balance claimed to be due to him from the attorney in the country.

Bayley, J.—It is quite clear that this is money had and received to the use of the assignees, because they are the parties to whom the general property of the bankrupt belongs. The defendant, as agent for the attorney in the country, must have known that the money was received for their use. The defendant must stand in the same situation as *Baldwin*, and before he can make any valid defence to this action, he must shew that *Baldwin* had a right to retain the money against the assignees. It cannot be said that the defendant was carrying on the suit upon the credit of the assignees, but on the credit of *Baldwin*, and therefore he could not maintain an action against the assignees to recover the amount of his bill from them. Suppose the assignees had paid *Baldwin* his bill of costs, then all right which the defendant had as an agent would be destroyed. The justice of the case is clearly against the defendant. He, as agent, is the hand to receive the money, but he knows at the time he receives it, that he receives it for the benefit of the assignees. Suppose *Baldwin* had received it, he would have received it for the use of the assignees, and he clearly would not have a right to stop it in transitu. Unless *Baldwin* had that right, I am of opinion that the defendant has no right to pay *Baldwin's* debt with the money belonging to the assignees.

Holroyd, J., and Best, J., concurred.

Rule refused.

On a subsequent day *Denman* obtained a rule nisi for

reducing the amount of damages by such sum as should appear to be due to the defendant in respect of his agency in recovering the particular sum of money for which the action was brought.

1822.

MOODY v. SPENCER.

HENDRY v. BIERS and Two Others.

Thursday, Nov. 7.

By statute 23 *Geo.* 3. c. 70. s. 34, any action or suit against any person or persons, for any matter or thing *done by* any officer or officers of Excise, or any others acting in his or their aid, must be commenced within three months next after the cause of action. *Semble*, that this section extends to the officers themselves and others acting in their aid. At all events an action against officers of Excise, &c. not brought within the time limited is barred by the 28 *Geo.* 3. c. 37. s. 23, which extends to any action against *any* person or persons for any thing by him or them done in pursuance of any act or acts relating to the revenues of Customs and Excise.

THIS was an action of assault and false imprisonment, brought by the plaintiff against three defendants, two of whom were officers of Excise, and the third a person acting in their aid. At the trial before *Best*, J., at the last Assizes for the county of *Suffolk*, the plaintiff was nonsuited, on the ground that the action was not brought within three months next after the cause of action had arisen, as required by 23 *Geo.* 3. c. 70. s. 34.

Storks now moved to set aside the nonsuit, and obtain a new trial, and contended that the defendants were not within the protection of s. 34 of the statute above mentioned. By s. 33, notice of action is required to be given to officers of Excise, and their assistants, acting under the authorities and powers to them given by the several statutes made for securing the duties of excise and inland dues, for any thing done in the execution of, or by reason of his or their office, and by s. 31, any such officers, or other persons, acting in their aid, may tender amends to the party complaining; and then by s. 34, (upon which the question arose) it is enacted, "that if any action or suit shall be brought or commenced against *any person or persons for any matter or thing done by any officer or officers* of excise, or any others acting in his or their aid, in execution of, or by reason of

1822.
HENDRY v. BIERS.

his or their office, such action or suit shall be brought or commenced within three months next after the cause of action shall arise, and not afterwards." Now, he contended that this clause did not mean to extend to the officers themseves, but to any person or persons for any matter or thing done *by the officer or officers*, or any others acting in his or their aid. In this case all that was required, was to give the defendants the notice of action required by the statute, which had been done, and the plaintiff's right of action against these defendants could not, by any fair interpretation of s. 34 of the statute, be limited to three months.

Per Curiam.—How can any action be brought against any other persons under this statute, but for something done by the officer, or others acting in his aid? But, supposing there to be any thing in this objection, it is completely removed by the 28 *Geo.* 3. c. 37. s. 23, by which it is enacted, "that if any action or suit shall be brought or commenced against *any* person or persons for any thing by him or them done in pursuance of this or any other act or acts of parliament now in force, or hereafter to be made, relating to his Majesty's revenues of customs and excise, or either of them, such action or suit shall be commenced within three months next after the matter or thing done."

Rule refused.

Thursday, Nov. 7.

COLTHERD v. PUNCHEON.

Proof that a horse is "*a good drawer*" only, will not satisfy a warranty that he is "*a good drawer, and pulls quietly in harness.*"

ASSUMPSIT on the warranty of a horse, the warranty being, that the horse was "a good drawer, and would pull quietly in harness." At the trial before *Abbott*, C. J. at the last Assizes for the county of *Northumberland*, the plaintiff had a verdict.

1822.

COLTHERD v. PUNCHEON.

J. Williams now moved to set aside the verdict, and obtain a new trial, on the ground that the verdict was against the evidence in the cause. The evidence was, that the horse was *a good drawer*, but it did not appear that he pulled *quietly in harness.* He therefore submitted that the warranty being stated in the declaration as an entire contract, the plaintiff ought to have proved the whole of it before he could recover. Being "*a good drawer*," and "*pulling quietly in harness*," he insisted were not convertible terms; for a horse might be a good drawer, and yet not pull quietly in harness. As the plaintiff therefore had failed in proving the whole of his allegation, the verdict could not be sustained.

Per Curiam.—There is nothing in this objection. In assumpsit the rule is, that you must prove the whole of the consideration, but you need not prove the whole of the promise. The consideration here is, that the plaintiff would buy of the defendant the horse at a certain price; and the promise is, that the horse is a good drawer, and pulls quietly in harness. The very words of the promise need not be laid nor proved; it is sufficient to state the substance, and if that be proved, it is enough to support the action. But it is quite clear, in this case, that these are convertible terms, because no horse can be said to be a good drawer, if he will not pull quietly in harness; and therefore proof that he is merely a good puller will not satisfy the warranty. The word "good" must mean "good in all particulars."

Rule refused (*a*).

(*a*) Vide 2 Bos. & Pul. 79. Lutw. 237. Cro. Eliz. 79. 1 Taunt. 212. 523. 1 New Rep. 172. 1 Campb. 362. 2 Ibid. 307. 4 East, 464, 5. 6 Ibid. 568. 8 Ibid. 79. 12 Ibid. 1. 13 Ibid. 102. 120. 1 T. R. 240. 4 Ibid. 560. 5 Ibid. 490. 7 Ibid. 348. Doug. 138. 669.

1822.

Thursday, Nov. 7.

DOE *v.* ROE.

Service of declaration in ejectment by leaving it with the daughter of the tenant in possession (who was confined by indisposition), with an affidavit that the daughter acknowledged the receipt of the declaration, and that she had read it over and explained it to her mother before the essoign day of the Term, sufficient for a rule nisi for judgment against the casual ejector.

CHITTY moved for judgment against the casual ejector, upon an affidavit of the service of the declaration in ejectment upon the tenant in possession (who was confined to her room, and could not be seen), by leaving it with her daughter, the deponent swearing to an acknowledgment by the daughter the day before the essoign day of the Term, that she had read over the declaration to her mother, to whom she explained its meaning.

The Court thought this sufficient for a rule nisi, which was accordingly granted, and afterwards made absolute without opposition.

Thursday, Nov. 7.

HOPLEY *v.* THORNTON.

Judgment entered up on an old warrant of attorney, the affidavit stating that the defendant was alive at *New South Wales* in the month of *August* last, as appeared by a letter received from him of that date.

E. LAWES moved to enter up judgment on an old warrant of attorney, upon an affidavit, stating that a letter had been received from the defendant, residing in *New South Wales*, shewing that he was alive in the month of *August* last. He founded his motion on the authority of the case of *Vaughan* v. *Ellis*, recorded in the Rule Office, *Mich.* 40 *Geo.* 3, in which the Court gave judgment on a like application, supported by an affidavit that the defendant was alive at *St. Petersburgh* in the month of *September* preceding. The affidavit in the present case went on further to state, that the deponent verily believed the defendant to be still alive.

The Court thought the affidavit sufficient, and therefore gave leave to enter up judgment.

1822.

Thursday, Nov. 7.

Ex parte BOYLE.

Where a sheriff or his deputy neglects to enter a plaint in replevin, in the county Court, for damage feasant, this Court will not compel him to do so on motion.

PULLER moved for a rule, calling on the sheriff of *Devonshire*, or his deputy, to shew cause why he should not enter a plaint in replevin, in his Court, under the following circumstances:—The cattle of one *Chugg* having trespassed on the lands of a person named *Boyle*, they were impounded by the latter, and replevied by the former. Upon applying at the office of the under sheriff to ascertain whether any plaint had been entered, whereon to found the replevin, it was discovered that none had been entered. It was contended, therefore, that *Chugg* could not proceed in his replevin until the plaint was entered; and it was suggested by the affidavits, that the neglect to enter it was by collusion between the sheriff's deputy and the defendant in replevin. Until the plaint was entered nothing could appear on the records of the county court; consequently, the defendant in replevin could not force the plaintiff on, or non pros his suit if not prosecuted. In point of law, he insisted, that the preliminary step on the part of the sheriff was to enter the plaint before he granted replevin. The granting a replevin is founded on an actual levying of a plaint, and therefore pre-supposes an entry of that plaint in the sheriff's court. In *Richards* v. *Acton* (a) the Court of *Common Pleas* interfered in a summary way, not only against the sheriff, but his under-sheriff, and replevin clerk, where a discovery of the names of the pledges had been refused, holding them all answerable for the sufficiency of the pledges. In principle that case was like the present. It did not appear from the affidavit that any pledges to prosecute had been taken by the sheriff, and therefore the defendant was in no condition to take an assignment of the replevin bond, and proceed as in ordinary cases.

(a) 2 Sir Wm. Bl. 1220.

1822.

Ex parte BOYLE.

ABBOTT, C. J.—We have no authority to grant the present application. If the sheriff grants replevin without taking pledges, he may be liable in an action on the case for his negligence; but we cannot order him, by a rule of this Court, to enter a plaint in his own Court. The sheriff is to take a bond, and if no plaint is entered, which is the act of the party, the bond is forfeited. If a bond has been taken, the sheriff should be called upon to assign it. You had better inquire farther on that head. At present there is nothing whereon to found the jurisdiction of this Court; and therefore we have no authority to interfere. If we can do any thing it must be by writ of mandamus to compel the sheriff to enter the plaint; but there is no such application now made to us. Where the sheriff neglects his duty, the party has another remedy without applying to this Court.

The rest of the Court concurred.

Rule refused (*a*).

(*a*) It seems doubtful whether the sheriff is bound to take a bond in damage feasant, and it seldom is taken in such cases. The statute of *Marlbridge*, 52 *Hen*. 3. c. 21, which enables the sheriff to grant replevin without suing any writ out of Chancery, says nothing about pledges. By the common law, according to which replevin for distress damage feasant may now be granted, it is only necessary that, first, pledges for the prosecution, which are merely nominal (*John Doe* and *Richard Roe*) should be given; and, second, pledges *pro retorno habendo*. 1 Ld. Raym. 278. The statute 11 *Geo*. 2. c. 19. only prescribes that a bond should be taken where the distress is for *rent*, and nothing is said there respecting distress damage feasant. Vide *Archbold Pr*. vol. ii. p. 63, *et seq*.

SPROULE *v.* LEGGE.

Thursday, Nov. 7.

Declaration upon a promissory note made in *Ireland*, alleging that it was made payable at *No.* 81, *Dame Street, Dublin*, for sterling money without going on to aver that *Dublin* is in *Ireland*, and that the money for which the note is given is *Irish* currency, is insufficient.

ASSUMPSIT by the indorsee against the maker of a promissory note, with the common money counts. The defendant suffered judgment to go by default on the money counts, and pleaded the general issue, non assumpsit, to the counts on the note. At the trial before *Abbott*, C. J. at the *London* adjourned Sittings after last Term, the question was, whether the note was sufficiently set out in the declaration. The allegation in the declaration was, that the defendant "on the 2d of *March*, 1815, at *Dublin*, to wit, at *London*, &c. made his certain promissory note, &c. and thereby promised to pay at No. 81, *Dame Street, Dublin*, forty-one days after the date thereof, to plaintiff or order, the sum of 121*l.* 17*s.* 6*d.* *sterling*, for value received, &c.;" and it appearing that the note was drawn in *Ireland*, and there being no averment that *Dublin* was in *Ireland*, the learned Judge was of opinion, acting upon the authority of *Kearney* v. *King* (*a*), that the note was insufficiently set out in the declaration, and directed the Jury accordingly; but a verdict was found for the plaintiff on the money counts, to which there had been judgment by default, without interest on the damages.

Campbell now moved for a rule nisi to enter a verdict upon the first two counts of the declaration, with a view to costs, and the interest due on the promissory note. He contended that this case was clearly distinguishable from *Kearney* v. *King*. That was a declaration on a bill of exchange alleged to be drawn at *Dublin*, but which did not appear to be made payable in *Dublin*. In this case the promissory note was drawn in *Dublin*, and was made payable at No. 81, *Dame Street, Dublin*. The

(*a*) 1 Chit. Rep. 28. S. C. 2 Barn. & Ald. 301.

1822.

SPROULE v. LEGGE.

question therefore was, whether a person reading this declaration would not sufficiently draw the inference that this was an *Irish* promissory note made in *Ireland.* If any common person would do so, the Court would. The objection made at the trial was, that it was not sufficient to state in the declaration that the note was made payable *at No.* 81, *Dame Street, Dublin,* but that it should have gone on and said, " meaning *Dublin* in *Ireland.*"—(*Bayley,* J. Are we to take notice judicially that *Dame Street, Dublin,* is in *Ireland?*) The Court certainly will not judicially take notice of vills and parishes, but they will of counties. Now *Dublin* is a county, and there seems no good reason why the same principle should not apply.—(*Bayley,* J. The reason why the Court judicially takes notice of counties in this country is, that the sheriff of the county is the person to whom the Court directs its writs.) There are many public acts of parliament in which *Dublin* is mentioned without describing it as being in *Ireland,* and in construing such acts the Court would be bound judicially to take notice that the *Dublin* therein mentioned meant *Dublin* in *Ireland.* Suppose an action brought in one of the *Irish* Courts upon a bill of exchange, accepted in *London,* made payable at No. 81, *Lombard Street, London,* would it be necessary to go on, and allege in the declaration that *London* was in the realm of *England?* Upon the face of this declaration the note is made payable at a place exceedingly well known, in the common understanding of mankind, and therefore *Dublin* must be understood to mean *Dublin* in *Ireland.* There is this distinction between the present case and *Kearney* v. *King,* that here the note is described as being made payable *at No.* 81, *Dame Street, Dublin,* which gives the place of payment local certainty, whereas in that case the place of payment was merely described as being *Dublin* generally.—(*Bayley,* J. The difficulty we had in that case was in saying that the *Dublin* therein mentioned meant *Dublin* in *Ireland.* Now there may be more *Dublins* than one, and, if I mis-

take not, there is a *Dublin* in *America*.—(*Abbott*, C. J. There was another difficulty in that case, which also exists in this, namely, that in that there was no sufficient description of the money for which the bill was given, as to whether it was *Irish* or *English*, and the question would arise whether the money mentioned would not be understood to mean *Irish* and not *English*. Supposing you had the allegation in this case that *Dublin* was in *Ireland*, and you had gone on to say that the defendant had made his promissory note at *Dublin* in *Ireland*, and thereby promised to pay so much money *sterling*, would that have done?) The difficulty in that case would have been removed, because *Irish* money in *Ireland* is called *sterling*; and therefore the objection would not have been available, because in an action upon a money security made in *Ireland* or in a foreign country, it must be understood that the money is to be paid according to the currency of the country in which the instrument is made. Therefore, the moment it is established that the note is made at *Dublin* in *Ireland*, the intendment of law is, that it is to be paid in *Irish* currency.—(*Best*, J. Can we in this Court know any thing of *Irish* currency?) The difference between the currency of the two countries is perfectly well known, and when the instrument is alleged to have been made in *Ireland*, it is not to be assumed that it is to be for *English* currency.—(*Abbott*, C. J. A bill may be made in *Ireland* for *English* money.—*Bayley*, J. You take upon yourself to state what the note is, according to its legal operation, and you describe it to be so much money sterling; must you not describe the money in pounds, shillings, &c. *English* currency, or money *English*?) Not if it is shewn that the contract is made in a foreign country.

ABBOTT, C. J.—I think that in an *English* Court of Justice we must understand, by "so many pounds sterling," that *English* money is meant. That was the opinion of the

1822.
SPROULE v. LEGGE.

Court in the case of *Kearney* v. *King*, which case was tried before me. There I declined to nonsuit upon the objection, but gave leave to move the Court upon it, and the Court was afterwards clearly of opinion that both the objections which arise in this case, as well as in that, were fatal. Acting upon the authority of that case the like judgment must be given in this. With reference to the effect of "so much money sterling," the words must be understood with reference to their context. It is very easy for the pleader to take the trouble of introducing two or three words into his declaration, which would save all this difficulty. The common mode of declaring upon a bill of exchange for foreign coin is to describe it as "so many ducats, &c. being of the value of so much money *English*," which saves all the trouble of inquiring into the value of the money. I am clearly of opinion that nothing can be taken by this motion.

BAYLEY, J.—It is true that in some public acts of parliament, *Dublin* is mentioned without stating that that city is in *Ireland*, and certainly in any case coming before us under such acts, we might take notice judicially that *Dublin* is in *Ireland*; but in a case like the present, we cannot take judicial notice that *Dublin* is in *Ireland*; for as I have already said, there may be other places known by the name of *Dublin* beside the city of that name in that part of the united kingdom. After the case of *Kearney* v. *King*, which I think was properly decided, the objections to this declaration are fatal.

HOLROYD, J. was of the same opinion.

BEST, J.—We should involve ourselves in great difficulty if we were to hold this declaration sufficient. For instance, we might be called upon to hold that a declaration upon a bill of exchange, made at *Kingston* in *Jamaica*, would be

sufficient if it merely alleged that it was made at *Kingston* generally, which would clearly be bad, because we know that there is a great difference between the value of *English* money and the currency of our colonies.

Rule refused.

DYER *v.* ASHTON.

Friday, Nov. 8.

Payment of money into Court, upon a special contract, admits the contract, and concludes the defendant from impeaching its existence. Where a declaration by landlord against tenant, averred, that defendant became tenant to plaintiff of certain messuages, &c. from year to year, under a certain rent, payable half yearly, and that defendant undertook and promised that he would, during the continuance of the tenancy, keep the messuages, &c. in repair, and would, during the continuance of the said tenancy, pay rent; and alleged as breaches, in the first count, that the premises were not kept in tenantable repair; and in the second, first, non-repair, and, second, non-payment of rent; and the defendant having pleaded the general issue, and paid into Court half a year's rent *under the second breach*:—Held, that such payment admitted the whole of the contract:—Held also, that a stampt agreement for a lease for seventeen years and a half of the premises in question, to which the plaintiff was no party, but made between defendant and other persons, from whom plaintiff derived title to the premises, was admissible in evidence to prove the defendant's promise to keep the messuages in repair.

ASSUMPSIT by landlord against tenant from year to year of two messuages, with the appurtenances. Breaches to the first count, the not keeping the premises in tenantable repair; and to the second count, first, the not keeping in repair, and, second, the non-payment of rent. The defendant pleaded the general issue, and paid into Court, *under the second breach of the second count*, the sum of 6*l.* 10*s.*, being one half-year's rent. At the trial of the cause before *Richards*, C. B., at the last Assizes for the county of *Surrey*, it being previously understood that the plaintiff's interest in the premises, and a payment of rent up to *Michaelmas*, 1821, by the defendant to him, were admitted, the plaintiff put in evidence a memorandum of agreement, bearing date the 18th of *September*, 1804, between *Benjamin Bond*, *John Bond*, and *Joseph Bond*, executors of *John Bond*, surviving executor of *Mary Corbett*, of the one part, and the defendant of the other part; by which Messrs. *Bond* agreed, " when requested," to grant to

1822.

DYER v. ASHTON.

the defendant, and the defendant agreed to accept, a lease of the premises in question, for a term of seventeen years and a half, from the then next *Michaelmas*, at a yearly rent of 13*l*., payable half yearly. This document was stamped with an agreement stamp. The arrear of rent due at *Lady Day*, 1822, was then proved, and a great number of witnesses were called, who stated that the premises were not in tenantable repair. In answer to this case it was objected that the document produced, and which was the only evidence of any promise by the defendant to keep the premises in repair, could not be received in its present shape. If it was produced as a lease, it was inadmissible for being stamped with an agreement stamp only; if it was produced as an agreement, it was a chose in action, not assignable; and therefore could not form the subject-matter of an action. In reply to this objection the plaintiff produced the rule of Court under which the defendant had paid into Court the half year's rent, part of the sum claimed in the present action, which it was contended was an admission of the contract produced in evidence by the plaintiff: to which it was argued, that the necessary effect of the latter evidence was to shew that the defendant was a tenant *under a lease*, and not a tenant *from year to year*, and that being in direct opposition to the language of the declaration, the plaintiff must be nonsuited, inasmuch as the only proper plaintiffs were the Messrs. *Bond*, the other contracting parties. The learned Judge over-ruled both objections, but saved them, and the Jury found a verdict for the plaintiff, damages 88*l*.

Taddy, Serjt. now moved for a rule nisi to set aside the verdict for the plaintiff, and enter a nonsuit, and endeavoured to support both objections. The first divided itself into two branches; but the latter branch only required notice, because it could not be argued that an agreement for a lease, sued upon as such in the hands of an assignee, would maintain an action; but it was quite clear that the

document produced at the trial was, to all intents and purposes, a lease, and required a stamp as such, which it had not. It possessed the essential quality of a lease, namely, a present demise; under that demise the defendant had entered, had held, and had paid rent, and could not therefore now dispute its validity. He cited *Poole* v. *Bentley* (a), and *Doe* v. *Groves* (b). But if there could be any doubt on this point, the remaining objection was quite unanswerable; for the rule of Court under which the defendant had paid into Court the last accruing half year's rent, proved that he held under a lease, and not as a yearly tenant, and that he was the lessee of the Messrs. *Bond*, and not a tenant from year to year to the plaintiff; and consequently there was upon the plaintiff's own shewing a fatal variance between the facts of the case and the declaration. It might be urged that the payment of money into Court admitted the contract between the parties; but it had been decided that the effect of the payment of the money into Court depends upon the terms of the rule under whcih it is paid in, and that it will not support the breach in the declaration. *Mellish* v. *Allnutt* (c), *Stoveld* v. *Brewin* (d), and *Cox* v. *Parry* (e). Upon both grounds therefore the defendant is entitled to rule, and the plaintiff must be nonsuited.

ABBOTT, C. J.—It is a well established principle of law, and all the cases upon the subject agree in recognizing it, that in an action brought upon a special contract, payment of money into Court admits both the contract as stated in the declaration, and the money due upon it pro tanto. Now the contract stated in the declaration in this case is, that the defendant, as tenant from year to year to the plaintiff, will keep the premises in tenantable repair, and will pay a rent of 13*l.* per annum, half yearly. Then the effect of the

(a) 12 East, 168.
(b) 15 Ibid. 244.
(c) 2 M. & S. 106.
(d) 2 Barn. & Ald. 116.
(e) 1 T. R. 464.

1822.

DYER v. ASHTON.

payment by the defendant of 6*l*. 10*s*. into Court is clearly to admit the contract to keep in repair and to pay rent, and that a half year's rent is due from him to the plaintiff upon that contract. It is then said that the evidence in the cause went to shew that the defendant held under a lease from the plaintiff, and not as his yearly tenant; but I think that is not so; for the first tenancy was a yearly tenancy, and was not determined by evidence of an agreement for a lease, if it was an agreement only, as the document here clearly was. I can see no reason for disturbing the verdict in this case.

BAYLEY, J.—I am of the same opinion. As to the second ground of objection, I think the plaintiff has properly declared against the defendant as tenant from year to year, because it is quite clear the agreement which has been adverted to does not amount to a lease. It is only an agreement for a future lease *to be executed*; therefore until that lease is executed, the defendant is only tenant from year to year. Then as to the other objection, if it be conceded that the contract in this case is entire, the necessary effect of paying money into Court is to admit that contract. The legal principle deducible from all the cases upon this subject is no more than this, that the payment of money into Court admits the contract, but is not evidence to support the breach. It admits in point of fact, that such a contract was made, but that is all; it is for the Court to say whether the contract be legal or not. If in this case had the declaration contained a count for use and occupation, the defendant might have paid money into Court under that count, and then the objection now taken would have been available; but I think the payment of money into Court concludes the defendant as to the fact that such a contract existed.

HOLROYD, J., and BEST, J., concurred.

Rule refused.

1822.

Friday, Nov. 8.

LORIMER *v.* SMITH.

On the 11th of *September* defendant entered into a contract for the purchase of 1400 bushels of wheat, the bought-note stating that the corn was sold "according to sample, and that it should be paid for in bankers' bills, if required." The usage of the market (*Bristol*) was, to sell by sample, *subject to the buyers' inspection and approval of the bulk.* On the 19th *September* defendant applied to see the bulk, but was told by plaintiff that he would either send for a bushel on the spot or would send him a load home the next day, for his inspection, but that he could not shew him the bulk, as it was in another warehouse, and "he did not like to let him into his connexions." In a few days afterwards plaintiff sent to defendant to inform him thatthe wheat was ready for delivery on producing bankers' bills. In the mean time the market had fallen, and the defendant repudiated the contract;—Held, that he was not liable in an action for the breach.

ASSUMPSIT upon a contract for the sale of 1400 bushels of wheat. At the trial before *Bayley*, J., at the last Assizes for the county of *Gloucester*, the case proved in evidence was this:—The plaintiff was a corn-factor, and the defendant a merchant, at *Bristol*. On the 11th of *September*, 1821, they met on the Corn Exchange, when a bargain was entered into between them for 1400 bushels of wheat, to be sold by the plaintiff to the defendant at 9*s.* 6*d.* per bushel. The usual bought and sold notes were exchanged; —the latter specifying that the corn was "sold according to sample," and that bankers' bills should be given, if required. The defendant had also agreed to purchase of the plaintiff two other parcels of corn, but they were not included in the present action. On the 19th of *September* the defendant called at the plaintiff's warehouse, and was shewn the bulk of the two latter parcels of corn; but, upon requesting to see the 1400 bushels of wheat, he was told by the plaintiff, that he would either send for a bushel on the spot, or would send him a load home the next day, for his inspection, but that he could not shew him the bulk, as it lay at another warehouse, and "he did not like to let him into his connexions." The defendant answered that "that was rather a curious mode of doing business," and they parted. A few days afterwards a friend of the plaintiff called upon the defendant, and told him that his wheat was ready for delivery, on production of bankers' bills, and that it was now in the plaintiff's own warehouse, at the same time requesting him to go and examine the bulk. This, however, was declined, the negociation terminated, the defendant refused

to accept or pay for the wheat, and the present action was brought. The usage of the market was to sell by sample, subject to the buyer's inspection and approval of the bulk. The price of wheat rose between the 11th and 19th of *September*, and, after the latter date, declined. The learned Judge told the Jury, that, as the defendant was prevented from inspecting the bulk on the 19th, when he requested leave to do so, he was by law released from his bargain, and the Jury accordingly found a verdict for the defendant; and

W. E. Taunton now moved for a rule to shew cause why the verdict should not be set aside, and a new trial granted, upon the ground that the learned Judge had misdirected the Jury in point of law. He contended that there was no such actual and positive refusal by the plaintiff to shew the bulk of wheat to the defendant, as would in law release the latter from the contract which he had entered into to buy. There was in fact no refusal, there was only delay; and when it was considered that the defendant's neglect to complete his purchase was cotemporaneous with a heavy fall of the market, the Court would hesitate, at least, to give him so unfair an advantage over the seller as would arise to him if a short and excusable delay was to vitiate the agreement made between them.

Abbott, C. J.—It is in evidence that the usage and custom of the *Bristol* market, is, that the corn is sold by sample, subject to the buyer's inspection of the bulk, and there can be no doubt, that that is in law a very just and reasonable method of dealing. No seller would refuse to exhibit the bulk, without some strong reason for so doing, and the plaintiff is a striking instance of this; for he says, "you cannot see the bulk, for I do not like to let you into my connexions;" a sort of reason which, in my opinion, would justify any buyer in throwing up his contract,

It is said that the change of the market price was such as to influence the defendant's conduct; but if it were so, who was to blame but the seller, who, by his own misconduct, gave an opportunity to the defendant to take advantage of that circumstance? The plaintiff has no right to complain of the repudiation of the contract, for it does not appear that he was capable of performing his part of it, namely, the delivery of the corn, at least within a reasonable time; whereas the defendant really does sustain an injury, for he is deprived of the opportunity of using the corn for his own purposes, and of the chance of reselling it at a profit. I am of opinion that the defendant was, in point of law, released from his contract by the refusal of the plaintiff to exhibit the wheat, and that the direction of the learned Judge to the Jury was perfectly correct; and I have certainly no inclination to find fault with the verdict which they have found.

The rest of the Court concurred.

Rule refused.

MOORE and Another, Assignees of WILLIAM BARTRUP and SON, Bankrupts, v. JONATHAN BARTRUP.

Friday, Nov. 8.

A. and B. co-partners in trade, borrow a check for 200*l.* from B. for the express purpose of enabling them to liquidate the balance of an account with their bankers, but before the check is presented, they commit an act of bankruptcy, and afterwards return the check to C., declining to make any use of it: Held, that the check did not pass to the assignees, so as to enable them to recover the amount in trover.

TROVER, by the plaintiffs, as assignees of *William Bartrup* and *Son*, to recover the value of various bills of exchange, amounting together to the sum of 1016*l.*, and a banker's check for 200*l.*, alleged to have been delivered by the bankrupt to the defendant, after an act of bankruptcy committed, and by him converted to his own use. At the trial before *Holroyd*, J., at the last Assizes for the county of *Lincoln*, it appeared in evidence that the bankrupts carried on business together in co-partnership as wool-staplers,

1822.

MOORE v. BARTRUP.

having two establishments, one at *Lincoln* and the other at *Bradford* in *Yorkshire*. The father transacted the business of the firm at the former place, and the son at the latter. The defendant, who was brother of the elder bankrupt, resided at *Wakefield*, and was in the habit of assisting the firm with advances of money. On the 15th of *June*, 1821, the bankrupts were indebted to Messrs. *Moore* and *Co.*, bankers, of *Lincoln*, with whom they kept cash, in a sum of 1300*l.*; and on that day, having sent in a check for an additional sum, they refused to give them any further accommodation, until the balance was liquidated. The elder bankrupt being unable to do this, considered his affairs desperate, but in order to raise the money, he sent his daughter to the defendant, at *Wakefield*, to endeavour to prevail upon him to lend him sufficient for the purpose. The daughter could only prevail upon the defendant to give a check upon his banker for 200*l.*, saying, he would advance no more. In the mean time the younger bankrupt was endeavouring to collect outstanding debts, and by that means to pay off the balance, and restore the credit of the house with the bankers. He collected about 600*l.* in bills of exchange, which, together with the defendant's check for 200*l.*, which he had received by his sister's hands, he enclosed under cover to his father. His father, in the mean time, considering the affairs of the house to be irretrievable, committed an act of bankruptcy on the 20th of *June*, by executing a deed of assignment of all the partnership property in the name of the firm, to trustees, for the benefit of the creditors, expecting that his son would also execute the deed. When he received his son's letter, with its contents, he did not open it, but went with it to the latter, then at *Bradford*, when it was agreed that the check, together with various bills, to the amount already stated, should be remitted to the defendant, and they were remitted accordingly. The letter enclosing the bills and the check was burnt by the bankrupts. With respect to the bills of exchange, it was admitted at the trial that the plain-

1822.

MOORE v. BARTRUP.

tiffs must recover; but as to the draft for 200*l.* the question was, whether the defendant delivered it to the bankrupt's daughter for the express purpose of appropriating it specifically to the liquidation of the bankrupts' account with their bankers, or for their general controul, with power to dispose of it in any manner they pleased. For the defendant it was contended, that a banker's check was not in its nature an assignable security, such as could be the subject of an action at law; and second, that even if it were, still, the property in it, never vested in the bankrupts, so as to render the restoration of it by them to the defendant a payment within the meaning of the bankrupt laws; and the learned Judge being of that opinion, he directed the Jury to find a verdict for the plaintiffs for the amount of the bills of exchange only.

Vaughan, Serjt. now moved for a rule to shew cause why the damages should not be increased by the sum of 200*l.*, the amount of the draft in question. As to the first objection, here was a loan requested and given, not certainly in the shape of monies numbered, but still in a perfectly available shape for the purpose of the borrowers, and to them, and as regarded their proposed application of it, it was, to all intents and purposes money, and therefore was properly the subject of such an action as the present. As to the second objection, there was a clear and explicit appropriation of the draft, so as to vest a property in it in the bankrupts, prior to its being returned, or rather fraudulently paid, to the defendant. The letter which inclosed it, which it was most important to have produced, was opened and burnt, the draft itself was retained some time in the possession of the bankrupts, and was at length sent back to the defendant. This amounted fully to an appropriation of the money, and being once appropriated, and a property in it vested in the bankrupts, that property belonged to the assignees, and could not be legally restored to the defendant.

1822.

Moore v. Bartrup.

Upon both grounds, therefore, the plaintiffs were entitled to recover the amount of the draft, and the justice of the case required that the present rule should be granted.

Per Curiam.—There is no ground for the present application. The security in question was a banker's check. By the general rule of law, a banker's check is not money; it is a mere chose in action, not assignable, and not recoverable by action; and there are no special circumstances in the present case to take it out of the operation of the general rule. That is the first objection to the plaintiffs' right to recover, and the second is equally cogent. There never was any appropriation of the check by the bankrupts, nor did any *property in it* ever vest in them. Suppose the check had remained with the bankrupts, and had passed from them to the assignees, and the defendant had stopped the payment of it at his banker's;—could the assignees have recovered upon the check from the defendant? Certainly not, because no vested interest had passed to the bankrupts, and therefore none could by possibility pass to their assignees. The facts are these:—an offer of a loan is made to the bankrupts, but they, knowing the desperate state of their affairs, very honestly refuse it; he had the opportunity of committing a fraud upon the defendant by accepting the loan and using the check; but they were too honest to take advantage of it. If we were to grant the present application, we should enable the assignees to do that which the bankrupts have refused to do.

Rule refused.

Doe, on the Demise of Brook, v. Brydges.

Saturday, Nov. 9.

Demand of rent due from lessee to lessor, though made of a stranger, if made upon the land, is a sufficient demand, and need not be general, to sustain ejectment for a forfeiture for non-payment of rent, being lawfully demanded.

EJECTMENT to recover the possession of twelve acres of land. At the trial before *Park*, J., at the last Assizes for the county of *Essex*, it was necessary for the lessor of the plaintiff to shew, that a lease which he had before granted of the land in question to a person of the name of *Lawrence*, the term of which was then unexpired, was forfeited. The lease contained a proviso for re-entry on non-payment of rent. In support of the forfeiture, the lessor of the plaintiff relied upon a demand and non-payment of rent, under the following circumstances:—The lessor of the plaintiff went upon the land, on the 30th of *October*, and addressed himself to a person named *Warraker*, who held under the defendant one of three or four houses built upon the land by the defendant, and said, "I am come to demand of you 5*l.* for my rent." To this *Warraker* replied, "that he had paid his rent to Mr. *Brydges*, the defendant, and he did not understand paying any more." A similar demand was made upon the other occupants of the houses upon the land, being tenants of the defendant, but without success. It was objected, that this was not a sufficient demand to sustain a forfeiture, and that the demand should have been *general*, and not of strangers, whom, for this purpose, the defendant's tenants must be considered. The learned Judge, however, over-ruled the objection, and held the demand to be sufficient, having been made upon the land.

Walford now moved for a rule to shew cause why the verdict should not be set aside and a new trial granted, and contended that there was no sufficient demand of the rent proved, to sustain a forfeiture; and, relying on the authority of *Sweton* v. *Cushe* (*a*), he insisted that the demand ought to

(*a*) Yelv. 36.

1822.

Doe v. Brydges.

have been general, and not of a stranger, inasmuch as it must appear that the person of whom the demand is made, is one having authority to pay the rent. The defendant's tenants were, *quoad* the lessor of the plaintiff, perfect strangers, and therefore a demand of them was not sufficient to work a strict forfeiture.

Abbott, C. J.—I have no doubt that, upon special verdict, this might be considered as sufficient evidence of a demand of rent upon the premises. It is perfectly clear, that if there is no other person upon the land to pay the rent, such a demand as this would, upon all the authorities, be sufficient to sustain an ejectment for a forfeiture. The case of *Sweton* v. *Cushe* was argued upon special verdict, and may stand good. That was the case of warning to effect repairs of a house pursuant to the covenant of a lease, and it was held, that warning to a man who was not the tenant was not sufficient. I do not say, that the evidence in this case would have warranted us in saying that this would have been sufficient warning to the immediate tenant of the lessor; but here the demand of rent is made *upon the land*, and though it is argued that the demand is made upon persons who are strangers to the lessor, still I think that is sufficient.

The rest of the Court concurred.

Rule refused.

1822.

Hollis *v.* Proud.

Saturday, Nov. 9.

To trespass *quare clausum fregit*, the defendant justified, a right of way over the *locus in quo* in the *occupiers* of premises adjacent thereto, and it being proved that he was seised of the premises, in respect of which the right of way was claimed, and *occupied* only by means of a tenant to whom the premises were demised: Held, that he was an *occupier* to sustain the plea of justification pleaded.

TRESPASS for breaking and entering the plaintiff's close. Special plea set out a surrender of certain copyhold premises to the defendant, as customary tenant of the manor of *Stowheath*, in the county of *Stafford*; and stated, that the *locus in quo* was contiguous to a public highway, and lay between that highway and the said copyhold premises; it then averred a right of way in the "*occupiers*" of those premises across and over the *locus in quo*, to, and from, and between the said public highway, and the said copyhold premises; and that the alleged trespass was committed in the lawful use and enjoyment of that right of way. New assignment, that defendant "on other and diffierent occasions than those in the said plea mentioned, and in a greater degree, and to a greater extent, &c., broke and entered, &c." Plea Not Guilty thereto, and issue thereon. At the trial before *Bayley*, J. at the last Assizes for the county of *Stafford*, evidence was produced in support of the plea, but it appeared, that at the time of the alleged trespass, the defendant's premises were not in his own occupation, but in that of a tenant. It was thereupon contended for the plaintiff, that the new assignment was proved. The right of way, as pleaded and proved, was in the "occupiers" of the premises only, and as the defendant had demised them to a tenant, he did not come within the proper definition of an occupier; but on the contrary, had put himself beyond the scope of right pleaded in justification. The learned Judge, however, over-ruled the objection, and a verdict was found for the defendant.

Campbell now moved for a rule to shew cause why the verdict shonld not be set aside, and a verdict entered for the plaintiff, with nominal damages, and renewed the objection.

Hollis v. Proud.

The learned Judge had told the Jury, that although the defendant was not in the occupation of the premises at the time of the supposed trespass, still as he was lawfully seised of them, he had a right to pass over the *locus in quo*, to and from them. Now this was a misdirection in point of law. The right of way contended for, was in the occupiers; but here was an use of it by a person not an occupier; for a landlord, when he has demised his premises to a tenant, *in possession*, was no longer an occupier, either in law, or in fact. He demised the right of way with the premises, and was from that moment, as much a trespasser, as any third person. The new assignment, therefore, was well supported by the evidence, for here was "another and different occasion" than that set out in the plea, and the plaintiff was clearly entitled to a verdict.

Abbott, C. J.—I have no doubt that this case was properly disposed of at the trial. The defendant pleads that he is seised of a copyhold tenement, between which, and a public highway, the *locus in quo* is situated; and that he has a right of way over the *locus in quo*, to and from the highway, and his tenement. The plaintiff denies the right of way, and new assigns, that the defendant has used the way at other times, and for other purposes than those pleaded. Then it was incumbent on the plaintiff to prove, that the defendant had used the way on an occasion, and for a purpose, totally unconnected with his tenement; but this he does not do, and therefore his new assignment is unsupported by evidence. But I take the law of the case to be equally clear in favour of the defendant; for I think, notwithstanding, he had given the possession of the tenement to his tenant, he was still in law an "occupier," within the meaning of that word in its present application and use. I am not aware of any principle of law, or any legal decision, which lays it down, that a landlord may not use a right of way appurtenant to his premises, because they are in the possession of a tenant. On

1822.

HOLLIS v. PROUD.

the contrary, I think he is entitled still to use it; and that it is quite usual to do so, and in leases to stipulate for so doing, for the purpose of collecting his rent, of seeing that the premises are kept in repair, and for many other objects which might be mentioned. Upon these grounds, I am of opinion that there is no reason for setting aside the verdict in this case.

The rest of the Court concurred.

Rule refused.

WITTE and Another v. HAGUE and Another.

Saturday, Nov. 9.

A. an engineer, being employed by *B.* to erect a steam boiler, and other apparatus, in premises adjoining to the manufactory of *C.*, and in consequence of the explosion of the boiler from the insufficiency of the materials of which it was composed, the property of the latter was injured, and it being found as a fact by the Jury, that *A.* was personally present, and that his servants had the management of the apparatus at the time of the accident:—Held, that *C.* might maintain case against *A.* for the injury he had sustained. *Semble*, that if the Jury had negatived the fact of *A.*'s management of the apparatus, though the accident arose from an imperfection in the materials of which it was composed, he would not have been primarily liable.

ACTION on the case. The first count of the declaration alleged, that the defendants ignorantly, wrongfully, and negligently, erected a steam apparatus, in a building adjoining the plaintiff's manufactory; consisting, among other things, of certain part thereof, called the boiler, and certain other part thereof, called the safety valve, which were improperly constructed, and made of improper materials, and that the defendants having the care, management, and direction thereof, applied an excessive heat, and improperly stopped and closed the safety valve, by which an explosion was occasioned, whereby the manufactory of the plaintiffs was thrown down and prostrated, &c. The declaration contained several other counts, varying the mode of stating the grievance of which the plaintiffs complained. Plea, Not Guilty. At the trial before *Abbott*, C. J. at the Sittings in *Middlesex*, after last *Trinity* Term, the facts appeared to be these:— The plaintiffs, who were sugar refiners, occupied premises adjoining to the premises of a person named *Constant*, who

1822.
WITTE v. HAGUE.

carried on the like business. The latter employed the defendants, who are engineers, to erect a steam boiler, and other apparatus, for the purpose of refining sugar, by an improved method. In the course of the experiments made to bring the process to perfection, the boiler blew up, from an alleged imperfection in the materials of which the apparatus was made; and in the explosion, the premises of the plaintiff sustained the damage for which the present action was brought. At the trial, two heads of evidence were adduced on the part of the plaintiffs; first, to shew that the works, constructed by the defendants, were imperfect and insufficient for the purposes for which they were intended; and, second, that the defendants, by themselves or their workmen, were present, superintending and having the management of the works at the time the accident happened. It was objected in point of law, that this action did not lie against the defendants at the suit of the plaintiffs, supposing them to be liable remotely for the consequences of the accident; and that the action lay, if at all, against *Constant*, who might have his remedy over against the defendants. The learned Judge reserved this point, and left it to the Jury as a question of fact, whether, at the time the accident happened, the defendants, by themselves or their servants, had the conduct and management of the operations of the apparatus directing them, that if they had, they should find their verdict for the plaintiffs? The Jury expressly found the affirmative of the question put to them, and the plaintiffs had a verdict, the damages to be referred to arbitration.

Copley, S. G., now moved to set aside the verdict, and obtain a new trial; and contended, that assuming, for the sake of argument, the works in question had been imperfectly constructed by the defendants, still, this action could not be maintained. He was not aware of any action of a similar nature to the present having ever been brought before the Court. It was quite a novelty to say, that when

1822.

WITTE v. HAGUE.

one person is employed to do work for another and the work is done so imperfectly as to occasion an injury to a third person, the latter could maintain an action against the workman, to recover compensation in damages for such injury. No instance of this kind could be found in the books, and he submitted, that if the case rested upon that question alone, this action must entirely fail. For instance, suppose a coachmaker is employed by a person to make a carriage, and the work is done so imperfectly, and made with such improper materials, that when it is driven by the person for whom it is built, it breaks down, and causes an injury to a third person passing by, could it be said, that the third person could maintain an action against the coachmaker for the injury? He apprehended it could not, and yet there was no difference in principle between that and the present case. The force of this objection was felt on the other side, at the trial, and therefore, in order to meet it, great stress was laid upon that part of the case which went to shew, that the works were under the management of the defendants at the time the accident happened. Supposing, however, this fact to be sufficiently established, still he submitted that this action would not lie immediately against the defendants, but that the liability lay primarily upon the person for whom the work was done; for which purpose the defendants must be considered as the servants of the latter. At all events, he contended, that the verdict was against the weight of evidence in the cause, there being no sufficient proof that at the time of the accident, the defendants had the management of the apparatus.

Per Curiam.—The question, whether the defendants had the management of the works at the time the accident happened, was a question of fact for the Jury, and they have expressly found it in the affirmative. That question was put to them distinctly, with a view to the defendants liability, and the Jury having found the fact, that makes al' the differ-

1822.

WITTE v. HAGUE.

ence in the case; for, it is perfectly clear, that if the apparatus was under the management of the defendants, and they were conducting the process at the time of the accident, they are primarily liable to the plaintiffs for the consequences. If, indeed, that question had been negatived by the Jury, perhaps there might be some weight in the objection which has been taken in point of law. It appears from the evidence in the case, that this engine had been newly set up, and that in order to bring it into complete operation, the defendants and their servants were upon the premises, and owing to some mismanagement of the latter, and from some defect in the materials of which the apparatus was composed, the accident happened of which the plaintiffs complain. These facts having been found by the Jury, we are of opinion that this action is sustainable.

Rule refused.

Monday, Nov. 11.

DOE, on the Demises of BUDDEN and Others v. HARRIS.

Testator devises his freehold estates to trustees in trust, to secure an annuity of 60*l.* per annum to his wife for life, and then in trust for his two younger sons, and his two daughters, and all children to be begotten on the body of his wife, until they shall severally attain the age of twenty-one years, and then unto and among them, share and share alike, as tenants in common, and not as joint tenants. The will then granted a power to the trustees to receive the rents, and to lay out the surplus beyond the wife's annuity, and other charges thereon, in good securities, to grant leases of the estates for a term not exceeding seven years, "and if they should think it advisable to sell any part thereof *at any time after my death*:"—Held, that this latter clause did not control the express gift of the estates to the children in fee, when they should severally attain the age of twenty-one years.

EJECTMENT for a freehold messuage or tenement. At the trial before *Abbott*, C. J. at the *Middlesex* Sittings after last *Trinity* Term, it appeared that the lessors of the plaintiff claimed under the will of their father, who, it was admitted, died seised in fee of the premises in question, they being, at the time of his death, in the possession of a third person, under a lease since expired. The will contained a devise to certain trustees (the survivor of whom was the present defendant) their survivors or survivor, and their, or his heirs, &c. of all the testator's freehold property, to certain

1822.

DOE
v.
HARRIS.

trusts and uses therein specified; namely, to secure to his wife an annuity of 60*l.* a year for her life, with power to her to enter and distrain for the same; and then, "in trust for my two younger sons and my two daughters, and all children to be begotten on the body of my said wife, until they shall severally attain to the full age of twenty-one years, and then unto and among them, share and share alike, as tenants in common, and not as joint tenants." The will contained clauses empowering the trustees to receive the rents, and to lay out the surplus beyond the annuity and other charges thereon, in good securities; to grant leases of the estates for a term not exceeding seven years; and if they should think it advisable to sell any part thereof " at any time *after my death.*" The testator died without having any more children, His wife was still living when the action was brought. One of the daughters mentioned in the will was dead, and the other three children had all attained the age of twenty-one years, and were the present lessors of the plaintiff. In answer to this case, it was contended, that by the words of the will, the legal estate was vested in the trustees, and not in the children; and consequently that the present action could not be maintained. The learned Judge, however, was of a different opinion, and the Jury under his direction, found a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit.

W. E. Taunton now moved accordingly, and renewed the objection, contending, that the language of the will could not fairly be construed in any other way than to vest the legal estate in the trustees. The powers entrusted to them, were inconsistent with any other construction; for how could they have authority to lay out the rents, to grant leases for years, and, above all, to sell the estates themselves, "at any time after" the testator's "death," unless those estates were legally and absolutely vested in them?

1822.

DOE
v.
HARRIS.

Per Curiam.—There is an express gift of the estates to the children in fee, when they shall arrive at the age of twenty-one years; and we must, if possible, so construe every part of the will, as to give effect to that object. There is, however, no difficulty in doing this. The powers given to the trustees, are for the benefit of the children during their infancy, and a limitation is put to them by the express devise of the freehold. Till they reach the age of twenty-one, their interests are committed to the care and management of the trustees, and from that time they come into their own hands. The case was properly left to the Jury, and there is no ground for disturbing their verdict.

Rule refused.

Monday, Nov. 11.


DOE, on the several Demises of JOHN SOUTER, and GEORGE CHATFIELD and ELIZABETH his Wife, *v.* JOHN HULL and LANSDOWN HULL, Infants, by Sir GEORGE HARNAGE, Bart., their Guardian.

H. S. devises his estate to his wife in fee, and dies seised, leaving his widow and two sons, him surviving. After his death, the widow and the younger son, by deed of bargain and sale, convey the estate in fee to *H.* without the privity of the eldest son and heir-at-law of the testator. *H.* continues in undisturbed possession of the estate for twenty-two years, and dies possessed, bequeathing it to his children. Six years after *H.* entered into possession, *W. S.*, the eldest son and heir-at-law of *H. S.*, makes his will and devises all his real estate to his wife, and to his younger brother in trust for the life of the wife, and then to his children, and dies three years afterwards, without ever disturbing *H.*'s possession:—Held, that the trustees might maintain ejectment to recover the possession of the estate, notwithstanding *H.*'s quiet enjoyment for twenty-two years.

EJECTMENT to recover the possession of certain freehold lands and premises situate at *Midhurst*, in *Sussex*. At the trial before *Park*, J., at the last Assizes for the county of *Sussex*, the case was this:—*Henry Souter*, the father of the lessor of the plaintiff *John Souter*, being seised in fee of the premises in question, made his will, bearing date the 12th of *June*, 1788, by which he gave the same to his wife in these words, "I give to my loving wife *Mary Souter*, all my household goods and chattels, and I give to her a barn and piece of free land at *Midhurst*, in *Sussex*." On the 7th



of *October*, 1790, the testator died seised, leaving *John Souter*, who claimed to be his eldest son and heir-at-law, and his said wife, him surviving. On the 9th of *October*, 1794, the widow and *John Souter* jointly conveyed the premises to *Christopher Hull*, the father of the defendants, by deed of bargain and sale, who took possession and remained undisturbed therein till *July*, 1814, when he died, leaving his will, whereby he demised the premises to the defendants, in equal moieties. *Whicher Souter* was, in fact, the eldest son and heir-at-law of the testator *Henry Souter*, whom he survived, but he did not join in the conveyance to Mr. *Hull*. On the 6th of *November*, 1810, *Whicher Souter* made his will, by which he bequeathed all his real estate to his wife *Elizabeth Souter*, and his brother *John Souter*, (the party who joined in the conveyance to Mr. *Hull*) upon trust to make an inventory thereof, and first, by sale of part, to pay his debts, &c. the residue to his wife for life, or while she continued his widow, and upon her death, or marriage, to his children, share and share alike. *Whicher Souter* died shortly after making this will, and in 1803 his widow married the lessor of the plaintiff *George Chatfield*. Upon this case it was contended, that the lessors of the plaintiff were entitled to recover the premises, as devisees in trust under the will of *Whicher Souter*, the heir-at-law of *Henry Souter*, the original testator, and that the defendants must resort to their action against *John Souter*, the party to the conveyance to Mr. *Hull*, upon the deed. For the defendants three objections were taken. First, that as *Whicher Souter* was not in possession when he made his will, he could not devise a right of entry; second, that the realty did not pass under his will, the language of it being clearly referrable to personal property only; and third, that as Mr. *Hull* had maintained an adverse possession for twenty-two years, and had died so adversely possessed, and had bequeathed the estate to his children, a descent was cast. The learned Judge, however, was of opinion that the lessors of the plaintiff had

1822.

Doe v. Hull.

shewn a good title, and directed the Jury to find a verdict for the plaintiff, reserving the points of law raised for the defendants, with liberty to them to move to enter a nonsuit, if the Court should be of opinion that the objections were well founded.

Marryatt now moved accordingly, and relied mainly upon the first and last objections. Upon the first he contended, that as at the time when *Whicher Souter* made his will, there was an adverse possession of the lands, he had himself no right of entry, and consequently could devise none. An adverse possession for twenty-two years, undisputed and undisturbed, amounted to a disseisin, and the testator therefore had no interest to devise. *Goodright* v. *Forrester* (*a*). Upon the last point he submitted, that, as Mr. *Hull* had come into possession of the premises under a good title; had continued in possession undisturbed during a long course of years; had bequeathed the premises to the defendants; and had died in possession, without revoking his will, whereby the premises had descended to the defendants; there was clearly a descent cast, so as to bar this ejectment (*b*).

Abbott, C. J.—I am of opinion that there is no foundation for either of the objections presented for our consideration. With respect to the first, I think, there is no ground for saying, that the adverse possession of Mr. *Hull* has operated as a disseisin of *Whicher Souter*. Mr. *Hull* did not take possession wrongfully, he only wrongfully continued possession. He came in under right and title, which remained good during the life estate of *Henry Souter's* widow, but ceased at her death, and from that period he continued in possession wrongfully. But what is the effect of that? No more than that he is tenant by sufferance

(*a*) 8 East, 552.

(*b*) Vide Co. Lit. 239 b. Lit. s. 394. Adams on Ejectment, 1st ed. 52.

to *Whicher Souter,* who permitted him for a period to remain in possession. It has been held in a recent case in this Court, that a mortgagor in actual possession of mortgaged premises is tenant by sufferance to the mortgagee, and this is a still stronger case than that (*a*). I know of no authority which says, that a mere wrongful possession divests the estate of the party against whom the possession is adversely held. If the argument is to be carried to that extent, a mere adverse possession might be made equivalent to a fine and feoffment. Then, as to the second objection, I am decidedly of opinion, that no descent has been cast in this case. To allow the argument on this point would be to allow, that wherever a wrongful possessor dies in possession, and his heir enters, the real heir-at-law cannot support ejectment. That would be a monstrous proposition generally, but especially in this case where the heir-at-law was never disseised, and the defendants in the action were never seised at all. The language of "descent cast," imports that the ancestor is seised; and the question is begged, if it is assumed that in this case *Hull,* the ancestor of the defendants, was seised.

BAYLEY, J.—I am of the same opinion. In order to bar the power of devising a right of entry, there must be an actual disseisin of the devisor; a mere adverse possession will not suffice; he must be completely ousted of the freehold. The question, then, is, whether *Whicher Souter,* the devisor under whose will the lessors of the plaintiff claim, was ever divested of the freehold, and I am of opinion that he never was. The relation of Mr. *Hull* to *Whicher Souter* is that of landlord and tenant; the former was tenant by sufferance to the latter from the moment of Mrs. *Souter's* decease. This point was laid down in this Court in the recent case cited by my Lord, and is founded upon the doc-

(*a*) Ante, vol. i. 272.

1822.

Doe
v.
Hull.

trine in Lord *Coke* (*a*). The lessors of the plaintiff have shewn a clear title in *Whicher Souter*, and if he had an estate in the premises, he was competent to devise it; he does devise it, and it vests in the lessors of the plaintiff as devisees in trust under his will. To support a descent cast, it must be shewn that the ancestor was seised. Here, there was no seisin of Mr. *Hull*, the ancestor. In a case which I remember came from *Warwick* some time since, the counsel relied upon a descent cast. It appeared in evidence that the party originally came into possession rightfully, and his possession was lawful, until a particular person died. After the death of that person, the party held over, and levied a fine, and when he died an ejectment was brought against his heir. On behalf of the heir it was insisted, that there had been a descent cast. No, said the Court; for upon the death of the particular person alluded to, the ancestor became tenant by sufferance only; and therefore there could not be a descent cast, because there was no seisin. The definition which Lord *Coke* gives of a tenant by sufferance, is he who originally comes in by right, but continues in possession by wrong. Now, that is exactly the description of Mr. *Hull*, under whom the defendants claim, and therefore I think the lessors of the plaintiff are entitled to recover. It is said, that there has been an adverse possession for twenty-two years in this case. I know of no case in which it has been held, that a mere adverse possession (if this case is so put,) can operate as a disseisin, to prevent the owner of the freehold from devising it by will. Mr. *Hull* was only a disseisor in one way, namely, at the election of *Whicher Souter*. There are many authorities which say, that this would only be a disseisin at the election of the owner of the freehold of inheritance; and if *Whicher Souter* had thought fit to treat it as a disseisin, he would be warranted in doing so; but he was not bound to do so. *Doe*, d. *Atkyns* v.

(*a*) Co. Lit. 240, b.

Horde (*a*). On these grounds, I am of opinion that the lessors of the plaintiff are entitled to recover.

Holroyd, J., and Best, J., concurred.

Rule refused.

(*a*) Cowp. 689.

Prestidge *v.* Woodman, Esq.

Monday, Nov. 11.

Where a Justice of the Peace does an act under colour of his office, though he exceeds his jurisdiction, he is entitled to the notice required by 24 *Geo.* 2. c. 44. s. 1. before the party aggrieved can bring his action.

THIS was an action of trespass and false imprisonment. Plea, Not Guilty. At the trial before *Garrow*, B., at the last Assizes for the county of *Oxford*, it appeared that the plaintiff had been convicted by the defendant, a Justice of the Peace for the borough of *Chipping Norton*, and adjudged to pay a sum of 1*l.* 17*s.* 6*d.*, under the statute 1 *Geo.* 4. c. 54. for a wilful and malicious trespass; and the defendant having issued his warrant, the plaintiff was taken up and committed to prison for a time limited, or until the money was paid. It was objected, that the action would not lie, inasmuch as the defendant had not received the notice required to be given to Justices of the Peace by 24 *Geo.* 2. c. 44. s. 1. To this it was answered, that the defendant, being a local magistrate, had no jurisdiction to issue the warrant in question, inasmuch as it was directed generally to the constables of the county, and executed out of the borough; and therefore it was contended that the case was taken out of the statute, which required notice of action, and, consequently, that there was no necessity to prove notice. The learned Judge, however, was of opinion that the objection was fatal, and therefore directed the plaintiff to be nonsuited.

Jervis now moved for a rule to shew cause why the nonsuit should not be set aside, and a new trial granted, and

1822.

PRESTIDGE v. WOODMAN.

contended, that as he was in a situation to prove that the defendant was a local magistrate only, and had no jurisdiction in the place in which his warrant was executed, he was not entitled to notice of action, and relied upon the case of *Blatcher* v. *Kemp* (a), and upon the words of the statute, " for any thing by him done *in execution of his office.*" In the present case, the act of the magistrate was a wrongful act from beginning to end; for it was an act done out of his jurisdiction, and could not possibly be construed to be done " in execution of his office," because his office was limited to his jurisdiction. Beside this, he had an affidavit, shewing that the place in which the plaintiff was alleged to have committed the trespass was not locally within the borough of *Chipping Norton*. Upon these grounds he contended, that the nonsuit ought to be set aside.

ABBOTT, C. J.—I am of opinion that the nonsuit in this case ought not to be set aside. The case cited is widely distinguishable from the present. That was an action against a constable for acting under a warrant which was not directed to him, and in which he was not named; and the distinction taken by Lord *Mansfield* in the case of *Money* v. *Leach* (b), applied there, namely, that where the magistrate cannot be liable, the constable is not within the protection of the statute; but this is an action against the magistrate. Then, as to the language of the statute, I am of opinion, that the defendant has not excluded himself from its operation. He was acting quà magistrate, and though he made a mistake in the warrant, still he was acting in execution of his office. But it has been expressly decided, in a case precisely similar in principle to this, that a notice was still necessary, although the magistrate had acted erroneously. *Weller* v. *Tooke* (c). There is, therefore, no ground for the present application.

(a) 1 H. Bl. 15, n. (a).
(b) 3 Burr. 1766. 8.
(c) 9 East, 364.

1822.
Prestidge
v.
Woodman.

Bayley, J.—I am of the same opinion. It has been decided over and over again, that notice of action is not necessary, unless the Justice has exceeded his jurisdiction, in which case he is entitled to notice. The defendant does the act complained of under colour of his office, and that brings him within the protection of the statute, even though he had no jurisdiction in the place where his warrant was executed. It is said, that the place where the plaintiff committed the act imputed to him was not locally within the borough; but the defendant might not accurately know the exact boundary of the local jurisdiction. It is clear, that if he kept within the line of his authority, there would have been no occasion to give him notice; but it is because he is supposed to have exceeded his authority, that notice becomes necessary. Many cases have decided, that though the Justice exceeds his powers, yet if he is acting bonâ fide and under the supposition that he is right, he is entitled to notice, the object of the notice being, that if he be wrong, he may set himself right by tendering amends. In a case decided in the interval between *Douglas's* Reports and the *Term Reports*, it was distinctly laid down by the Court, that it is immaterial whether the Justice had a right to act or not; for if he thought he had a right to act he was entitled to notice (a).

Holroyd, J., and Best, J., concurred.

Rule refused.

(a) *Bird* v. *Constable*, Mich. 25 *Geo.* 3. That was the case of a person convicted of riding on the shafts of his cart on the King's highway. It appeared that at the time the man was on the shafts, his cart was standing still, and consequently the case was not within the statute, inasmuch as the cart was not in motion, but he was nevertheless convicted by the Justice; and the question was, whether the Justice was entitled to notice of action. The Court said, it was immaterial whether the Justice had a right or not to act in the way complained of; for if he thought he had a right to act, he was clearly entitled to notice.

1822.

Tuesday, Nov. 12.

The King *v.* Fielder and Another.

Semble, that the consent of the counsel for the prosecution cannot dispense with the rule which requires the presence of defendants convicted upon a criminal proceeding, during a motion for a new trial.

AT the Sittings in *Middlesex*, after last *Michaelmas* Term, before *Abbott*, C. J., the defendants had been convicted of a misdemeanor.

Adolphus was now instructed, on behalf of the defendants, to move for a new trial. The defendants not being personally present, conformably to the rule which requires that the defendant in a criminal proceeding shall be in attendance in Court during a motion for a new trial, he said he had the consent of the Counsel for the prosecution, dispensing with the presence of the defendants, and therefore prayed leave to make his motion in their absence.

Denman, C. S., for the prosecution, said he had no objection; but,

Per Curiam.—The rule is, that in all criminal cases, a motion for a new trial cannot be made, unless the defendant is present in Court, and therefore the more correct course of proceeding is to have these defendants present, notwithstanding the consent of the counsel for the prosecution.

Adolphus, therefore, was not allowed to move, in the absence of the defendants.

1822.

The KING *v.* The INHABITANTS of ALL SAINTS, in CAMBRIDGE.

Wednesday, Nov. 13.

Where a person rented and resided on a tenement of 9*l.* 10*s.* a year, and during the same time contracted by the year for two ponds, or for the rushes and flags growing therein (he being by business a chair bottomer), the owner of the ponds reserving to himself the use of the water as he thought proper, the rent agreed for being 5*s.* a year for one pond, and 5*s.* and two door mats of the value of 2*s.* for the other:—Held, that he thereby acquired a settlement.

BY an order of two Justices, *Lydia Fowler* was removed from the parish of *The Holy Trinity* to the parish of *All Saints*, both in the county of *Cambridge*. On appeal, the Sessions confirmed the order, subject to the opinion of this Court, upon the following case:—

The pauper's maiden settlement was in *All Saints* parish. In the year 1793 she married one *William Fowler*, a chair bottomer and mat-maker, with whom she travelled about the country, and who had no legal settlement unless the following be adjudged so. In 1807 he hired a house in the parish of *Saint Peter's*, *Cambridge*, of the value of 9*l.* 10*s.* per annum, and resided therein with his family above a year; during the same time he had two separate parol contracts for two ponds, or for the rushes and flags growing therein, under the following circumstances:—One of the ponds was of the extent of three acres, in which he was to have the exclusive right of cutting the rushes and flags at his pleasure, but not of draining off the water; the owner had the right to use the water, or drain it off as he thought proper; for this the pauper was to pay 5*s.* a year to Mr. *Cawcutt*, the occupier of the farm in which it was situated. The pond was not fenced off from the rest of the field; and Mr. *Cawcutt*'s cattle, when depasturing there, used the pond for drinking at; but the rushes and flags were not such herbs as the cattle would eat. The other pond was only about a quarter of an acre, occupied under circumstances similar to the preceding, at the like yearly rent of 5*s.*, and two door mats of the value of 2*s.* The next year he agreed to pay 10*s.* for the same, but died before all the rushes were gathered. The contracts for the ponds subsisted during all the time the pauper occupied the house in *Saint Peter's*.

1822.

The King v. The Inhabitants of All Saints, Cambridge.

Starkie, in support of the order of Sessions, made two points, first, that this was a mere personal contract for the sale of the growing rushes, with liberty to the vendee to enter the land of the vendor for the purpose only of cutting them down; and consequently that the pauper's husband did not rent a tenement within the meaning of the statute, so as to confer a settlement on the wife; and, second, assuming this to be a tenement within the meaning of the statute, there was no occupation by the pauper's husband of a tenement of the value of 10*l.* for forty days. As to the first point, it appeared from the facts of the case, that the pauper's husband had merely a chattel interest, namely, the privilege of cutting rushes accidentally growing by the sides of the ponds in question, subject to the right of the owner to use the water and soil of the ponds, and to drain off the water at his pleasure, and as a consequence to suffer the rushes to grow or not, as he might think proper, and also to the right of the owner's cattle to eat or destroy the crop of rushes (the ponds not being fenced off) should they happen to meet with no food of a more palatable description. All these were circumstances which completely negatived the presumption of any interest in the land vested in the pauper's husband, so as to confer a settlement. It was true that he was to pay so much a year for the rushes; but that must mean only, so much for the crop. As well might it be said that a contract for the purchase of a crop of growing apples, with the privilege of entering the orchard to gather them, would confer a settlement. Both cases were precisely analogous in principle. Upon this point he cited *Rex* v. *Old Arlesford* (a), *Rex* v. *Stoke* (b), *Rex* v. *Brampton* (c), *Warwick* v. *Bruce* (d), *Parker* v. *Staniland* (e), *Emmerson* v. *Steelis* (f), *Crosby* v. *Wadsworth* (g),

(a) 1 T. R. 358.
(b) 2 Ibid. 451.
(c) 4 Ibid. 348.
(d) 2 M. & S. 205.
(e) 11 East, 362.
(f) 2 Taunt. 38.
(g) 6 East, 602.

1822.

The King v. The Inhabitants of All Saints, Cambridge.

and *Pincomb* v. *Thomas* (a). Then, secondly, assuming this to be a tenement, still there was not a residence upon a tenement of 10*l.* for forty days, inasmuch as the value of the crop of rushes would diminish de die in diem, according as the pauper's husband might choose to cut them down. It must be shewn that the occupant has an interest in the land of the requisite value during the whole period of forty days. Now, for any thing that appeared in the case, the whole or great part of the crop might have been cut down before the forty days expired; and if so, it was clear from the authority of *Rex* v. *Bowness* (b), that no settlement was gained. In that case the pauper rented a dwelling-house, and other premises, of the annual value of 4*l.* for a whole year, and he bought a crop of growing oats by auction during the year for the price of 12*l.* 14*s.* The oats were bought on the 12th of *August*, and were of different kinds, and ripened at different periods, and he began to reap them on the 14th of *September*, and continued reaping them as they ripened, and carted them away at intervals between the 14th of *September* and the 3d of *October*, on which day he carted off the last load. The question was, whether, under such circumstances, he gained a settlement? And in giving judgment, *Le Blanc*, J. said, "There is one objection to which no answer has been given. It is admitted that the party must have come to settle in a tenement, that is, must have resided in the parish in which he held a tenement of the value of 10*l.* for forty days. Now, in this instance, allowing all that has been stated as the law to be correct, and the authorities to apply, and granting that this was a tenement, how can we say that this person has resided forty days in the parish, while he held a tenement of the value required? He rented the dwelling-house and other premises of the annual value of 4*l.* for the whole year, and he bought a crop of oats by auction on the 12th of *August*, which he began to cut on the 14th of *September*, and it does not appear but

(a) Cro. Jac. 524.

(b) 4 M. & S. 210.

1822.

The King v. The Inhabitants of All Saints, Cambridge.

that he carried the greater part in value of the crop before the expiration of forty days from the time of his first purchasing it; and if that were so, his interest would have ceased pro tanto within the forty days, and he would not have held a tenement for that time of the annual value of 10*l.* Therefore, on the ground that it does not appear that there has been a holding for forty days of a tenement of the value of 10*l.* a year, I think that the order of sessions cannot be supported." It seemed therefore that this was a decisive authority upon this question, and consequently the sessions did right in affirming the order.

Storks, contrà, was stopped by the Court.

Abbott, C. J.—I confess I am not able to draw any distinction in principle between grass and rushes or flags growing. Taking a crop of grass has been over and over again held to be the taking a tenement, that is, the taking of such an interest in the land as will confer a settlement. If this had been a bargain for a particular crop of rushes, and could be said to be a mere sale, then it would be only matter of personal contract, which was the case in *Rex* v. *Bowness*. But this is not a contract for the sale of a particular crop of rushes, which the man is to take away as soon as they are in a fit state to be severed. The contract here is for all the rushes growing during the year; for which he is to pay a yearly rent, according to the very terms expressed in the case. So that he is entitled not merely to cut one crop, but as many rushes as shall grow upon the ponds by the course of nature during the year for which they are taken. This case therefore is in this respect perfectly distinguishable from *Rex* v. *Bowness*. In that it was merely a contract for a single crop of oats; but here the pauper's husband is entitled to take as many crops as shall grow during the year, for which he is to pay a yearly rent.

1822.

The King v. The Inhabitants of All Saints, Cambridge.

Bayley, J.—I am of the same opinion. I think this is not merely a personal contract for the sale of a growing crop of rushes, but that it is taking a tenement within the meaning of the statute, according to the principle of decided cases. It is clear that the pauper's husband had an interest in the soil according to the terms of the agreement. He had a right to have the soil applied to the growth of the rushes, and the person with whom he agrees had no right to destroy the crop by subtracting the soil from which it sprung. This, it will be recollected, was a growing crop, and the case in this respect is perfectly distinguishable from those cases where the growth of the subject-matter of the contract was complete, so as to make it only a sale of goods and chattels. Here the man has an interest in the soil, and the contract is for a year. If this be so, then the second ground of argument which has been taken completely fails, namely, that there was no residence for forty days upon a tenement of 10*l.*, because the value of the crop would be diminished by its severance from day to day before the forty days expired, and therefore it could not be said that during that period he occupied a tenement of the requisite value. It is imposible for such an argument to hold good, because, if it is to prevail, it must be carried to this extent; that if a man takes grass land clearly worth 10*l.* a year, and on the thirty-ninth day he cuts down and carries away the whole produce of the land, he gains no settlement. If the argument is good for any thing it must go that length. I am clearly of opinion, upon the principle of the numerous cases which have been decided on questions of this nature, that a settlement has been gained under the circumstances of this case.

Holroyd, J.—I am also of the same opinion. The whole of the rushes were not to be cut at one time; but the pauper's husband had a right to take successive growing crops, and he was the only person who could enter the land

1822.

The King v. The Inhabitants of All Saints, Cambridge.

and enjoy that species of property. He had not only a right to the crop growing at the time of the contract, but he was entitled to have the soil in the land applied to successive crops as long as the contract continued. Supposing the owner of the soil were to draw off the water from the ponds, still the first heavy shower of rain would replenish them, and the rushes would begin growing again.

Best, J.—This case is distinguishable from *Rex* v. *Bowness*, which was merely the case of a purchase by auction of a particular crop of oats, to be cut and carried as soon as it was ripe, the pauper having at all events no interest in the land after the crop was carried; but here the pauper's husband has a continuing interest, and it is found, as a fact, in the case, that the taking of the ponds is by the year, and he is entitled to all the crops which may grow during the year.

Order quashed.

Wednesday, Nov. 13.

The King *v.* The Justices of Denbighshire.

An order made by Justices of Peace, under stat. 55 *Geo.* 3. c. 68. *s.* 2. for stopping up an old highway, and setting out a new one, must shew that it is made with the consent in writing under the hand and seal *of the owner of the land through which the new highway is proposed to be made.*—Where an order, made under this statute, recited that the Justices had received evidence of the consent of *T. J.*, esq. *in his life-time*, to the new road being carried through his lands, by writing under his hand and seal, and it appeared that another person was owner of the land at the time the order was made:—Held, that such order was insufficient, and could not be carried into execution.

By stat. 55 *Geo.* 3. c. 68, s. 2. which repeals 13 *Geo.* 3. c. 78, it is declared, "That when it shall appear upon the view of any two or more Justices of the Peace, that any public highway, or public bridleway or foot-way, may be diverted, so as to make the same nearer or more commodious to the public, *and the owner or owners of the lands and grounds through which such new hihgway*, bridleway or foot-way, so proposed to be made, shall consent thereto, by writing under his or their hand and seal, or hands and

seals, it shall and may be lawful, by order of such Justices, at some special Sessions, to divert and turn, and to stop up such foot-way, &c." An order having been made under this act by two Justices of *Denbighshire*, at a special Sessions held for that purpose, after reciting that a certain part of the highway between *Poolmouth* and that part of the new turnpike road leading from *Wrexham* to *Ruthin* in the said county of *Denbigh*, (describing it in length and locality, according to a plan thereunto annexed,) might be diverted and turned so as to make the same nearer and more commodious to the public, proceeded as follows: "and having viewed a course in lieu thereof, commencing at, &c. and passing along an ancient highway to, &c. where it enters the lands and grounds *of the late Thomas Jones*, Esq. of *Llantisilio*, and passing through the said lands to, &c. *and having received evidence of the consent of the said Thomas Jones*, Esq. *in his life-time*, to the said part of the new road being made and continued through his lands herein before described, by writing under his hand and seal, we do hereby order that the said road be diverted and turned, &c." On appeal to the Sessions, this order was affirmed. In *Hilary* Term a rule nisi was granted for quashing this order, on affidavits stating, that at the time of making the order for diverting the road in question, the land and ground through which the said intended new road was ordered to be made, was not the property of the late *Thomas Jones*, Esq. but was the land and ground of another gentleman who had succeeded to the same on the death of Mr. *Jones*.

On shewing cause against this rule, the question was, whether the order for diverting the road made in the terms above mentioned, was a sufficient compliance with the requisites of the statute, which declares that the consent by writing under the hand and seal *of the owner* of the land and ground through which the new highway is proposed to be made, is necessary, in order to give validity to the

1822.

The King v. The Justices of Denbighshire.

order, it appearing at the time this order was made, that Mr. *Jones*, the person whose consent therein recited, was not the owner of the land in question.

Marryat, for the Crown, contended, that this order was sufficient, within the meaning of the statute. He submitted, that if Mr. *Jones* had, in point of fact, given a consent under his hand and seal, but died before the order was made, still it would be binding. His death would not rescind the consent which he had given, if it had been obtained as the foundation of this order. The burthen lay upon the other side to shew that Mr. *Jones's* consent had not been obtained. Indeed, the order itself stated, that Mr. *Jones's* consent had been obtained in his life-time, and as the Sessions had acted upon that consent, it would be extremely hard that the subsequent death of that gentleman should be a ground for vacating the order. The statute had given a certain form of order which the Justices were bound to pursue, and these Justices, acting upon the consent which had been given, recited such consent in their order. The late Mr. *Jones* had been tenant for life of the land in question, and it was quite clear that a tenant for life might give such a consent. Even a clergyman might give such a consent. (*Bayley*, J.—He has quasi the inheritance.) The consent of Mr. *Jones* had been obtained in the first instance, as a condition precedent, in compliance with the statute, and the question was, whether his death happening before the order was drawn up, vacated the proceeding.

Gaselee, contrà, was stopped by the Court.

Abbott, C. J.—I am of opinion that this order is insufficient. The safest construction of this act of Parliament, is to say, that the consent of the person who is the owner of the land at the time the order for diverting the road is actually made, shall be requisite, in order to give

1822.

The KING v. The JUSTICES of DENBIGHSHIRE.

it validity. The decision of this case, in this manner, will not touch any question that may possibly arise hereafter, where the death of the owner of the land happens after the order is made, but before it is carried into execution.

BAYLEY, J.—The objection to this order is, that it does not shew that the person whose assent is necessary to give it validity was living at the time it was made; nor indeed does it appear, that Mr. *Jones* was the owner of the land at any period of time since these proceedings were in progress. For any thing that appears to the contrary his consent might have been obtained years ago, and the Justices have been acting upon a consent of long standing, which may be prejudicial to the parties now interested.

HOLROYD, J. and BEST, J. concurred.

Order of Sessions quashed (*a*).

(*a*) Vide 13 *Geo.* 3. c. 78. *Davison* v. *Gill*, 1 East, 64, and *Rex* v. *The Justices of* ———, 1 Chit. Rep. 164.

Wednesday, Nov. 13.

SEYMOUR *v.* GARTSIDE, Widow.

After verdict in an action for a breach of promise of marriage by a gentleman against a lady, a count, alleging a promise on the part of defendant to marry plaintiff within a reasonable time after the request, and averring "that plaintiff, confiding in the promise, had always remained unmarried, and was still ready and willing to marry defendant, and that although a reasonable time for defendant to marry him had elapsed, yet defendant, not regarding her promise, did not, nor would within such reasonable time, marry the plaintiff, but had hitherto wholly neglected and refused so to do," is sufficient, after verdict, without averring that defendant had any notice of plaintiff being ready to marry her during the reasonable time alleged, or averring any request made to defendant to marry plaintiff, or any averment of a special refusal to marry him.

THIS was an action to recover damages for a breach of promise of marriage. At the trial before *Richardson*, J., at the last Assizes for the county of *Somerset*, a general verdict was found for the plaintiff, damages 40*s*.

C. F. Williams now moved for a rule to shew cause why the judgment should not be arrested, the damages having been taken generally, and objected, that the second count of the declaration was defective. That count stated "that in

1822.

Seymour v. Gartside.

consideration that the said plaintiff being then and there sole and unmarried, at the like special instance and request of the said defendant, had then and there undertaken and faithfully promised the said defendant to marry her the said defendant, she the said defendant undertook and then and there faithfully promised to marry him the said plaintiff in a reasonable time then next following. And the said plaintiff avers, that he, confiding in the said last mentioned promise and undertaking of the said defendant, hath always hitherto remained and continued, and still is, sole and unmarried, and hath been, for and during all the time last aforesaid, and still is, ready and willing to marry the said defendant, to wit, at *Bath* aforesaid, in the county aforesaid, and although a reasonable time for the said defendant to marry hath elapsed since the making of the said last-mentioned promise and undertaking of the said defendant, yet the said defendant, not regarding her said last-mentioned promise and undertaking, but contriving and fraudulently intending craftily and subtily to deceive and injure the said defendant in this respect, did not, nor would, within such reasonable time as aforesaid, or at any time afterwards, marry him the said plaintiff, but hath hitherto wholly neglected and refused so to do, to wit, at *Bath* aforesaid, in the county aforesaid." The objections to this count were, first, that it did not state that the defendant had any notice of the plaintiff being ready to marry her during the reasonable time therein alleged; second, that it did not state any request made to the defendant to marry him; third, that it did not aver any appointment of time when he was ready to marry her; and fourth, that there was no allegation of any special refusal to perform the contract of marriage.

Per Curiam.—We think, after verdict, this count will do very well. The words "did not, nor would, within such reasonable time as aforesaid, or at any time afterwards, marry him the said plaintiff, but hath hitherto wholly neglected and refused so to do," necessarily imply a request to marry. An

omission to offer to marry, in a lady, is generally construed into a refusal to marry. It can hardly be expected that a lady should say to a gentleman, "I am ready to marry you, pray marry me." After verdict, we think this count will do.

Rule refused (*a*).

(*a*) Vide *Bowdell* v. *Parsons*, 10 East, 359. *Bach* v. *Owen*, 5 T. R. 509.

HODSON, Gent. one, &c. *v.* GUNN.

Thursday, Nov. 14.

After the acceptor of a bill of exchange had offered to pay the debt and the costs of the action against himself, the plaintiff, who was an attorney and indorsee of the bill, brought another action against the drawer, who was his own client, the Court stayed the proceedings, upon payment of the debt and the costs of one action only.

MOTION to stay proceedings upon payment of debt and the costs of *this* action. It was an action against the acceptor of a bill of exchange, which was due on the 17th of *August*; on which day the defendant applied to the plaintiff, who was an attorney, and the holder of the bill, and requested him to wait a week, whereupon he promised to see the drawer and indorser, and let the defendant know the result, but the plaintiff did not communicate any answer to the defendant; on the 22d the plaintiff brought this action, when the defendant offered to pay the debt, without costs, which the defendant refused, and on the 4th of *September* he commenced an action against the drawer of the bill, who was sworn to be the plaintiff's own client. The defendant then offered to pay the debt, and the costs of the action against himself; but the defendant refused to stay the proceedings until he was also paid the costs of the action against the drawer; upon which the defendant applied to the Court.

Gurney, for the plaintiff, contended, that the general rule in these cases was, never to stay the proceedings against the acceptor of a bill of exchange but upon the payment of all the costs incurred. This was for the purpose of protecting those persons who are put to costs by the default of the acceptor, who is primarily liable. Unless some special and extraordinary circumstance was laid before the Court, this application could not be supported. None existed in this case.

1822.
HODSON
v.
GUNN.

When the bill became due, the defendant asked for a week's indulgence to take it up, which was granted, and not taking up the bill at the end of that time, the writ was sued out against him. He then offered to pay the debt, without the costs, which the plaintiff was not bound to take; and then, at the end of ten days, the plaintiff brought his action against the drawer, which he had a right to do, in order to compel the payment of the debt. Under such circumstances, it would be extremely hard upon a plaintiff to be obliged to lose those costs which had been incurred in consequence of the defendant's own misconduct. If the Court yielded to this application, a plaintiff could never expect to get his debt paid at the beginning of the long vacation.

Chitty, contrà, was stopped by the Court.

Per Curiam.—The plaintiff in this case is an attorney. This is an application to our discretion. The defendant applies to stay proceedings upon payment of the debt, and the costs of this action; the plaintiff says "No; I have a right, in addition to those costs, to demand the costs of another action which I have brought against the drawer." The Court has a right to see whether that second action has been properly brought; and we think that, after there had been an offer on the part of the defendant to pay the debt, the plaintiff ought not to have sued out a distinct writ against the drawer of the bill. There is enough disclosed upon the affidavits in this case, to convince us, that the additional action was not brought for the purpose of justice, or was necessary in order to obtain payment of the demand, but to oppress the acceptor of the bill of exchange, by compelling him to pay the costs of an action brought by the plaintiff against his own client,—he never meaning his own client to pay, but merely by such means to get so much more costs out of the acceptor's pocket. The case, therefore, is of that description which calls upon us to interfere.

Rule absolute.

1822.

Thursday, Nov. 14.

HOLBOROW and HUGHES *v.* WILKINS.

W., a broker, effects sale of twenty bags of wool for *H.* and *H.* to *C.* and *P.*, to be paid for by bill at eight months, accepted by the latter, and in his notice of sale says to the former, "To shew my opinion of this house, for an allowance of one per cent., I will guarantee half the amount." *H.* and *H.* confirm the sale, and inform *W.* that if he cannot procure from *C.* and *P.* acceptances of approved houses (which they would prefer), they will take his guarantee for one half the amount on the terms proposed. The wool is delivered to the vendees without the intervention of the broker, and the vendors take the acceptance of the former for the amount of the wool, made payable at a banker's. Before the bill is at maturity the vendees become insolvent, and the vendors resort to the broker upon his guarantee:—Held, that the broker was liable on his guarantee, though the bill had not been presented for payment, and though there was no proof that it would not have been paid if presented; but supposing it to have been presented and dishonored, he would not have been entitled to notice of non-payment.

SPECIAL assumpsit against a guarantee. At the trial before *Abbott*, C. J. at the *London* adjourned Sittings after last Term, it appeared in evidence, that in the beginning of the year 1818 the plaintiffs, who were wool merchants at *Stroud*, in *Gloucestershire*, employed the defendant, a wool broker in *London*, to effect sale for them of a parcel of wool, consisting of twenty bags, then lying in their warehouse at *Bristol*. The defendant accordingly shewed samples of the wool to Messrs. *Carver* and *Peet*, *Blackwell Hall* factors, of *London*, and they authorised him to make an offer to the plaintiffs for the same at 5*s.* 5*d.* per pound, to be paid for by their acceptance at eight months. In pursuance of this authority the defendant wrote the following letter to the plaintiff:—

"*London, February* 11th, 1818.

"Gentlemen,

"I have sold, subject to your confirmation, twenty bags (marks given) at 5*s.* 5*d.* per lb., usual tare and allowances, lying at *Bristol*, to Messrs. *Carver* and *Peet*, payable by their acceptance at eight months, fourteen days to weigh. *To shew my opinion of this house, for an allowance of one per cent., I will guarantee half the amount, and this I have not done for any house I have dealt with.*

"*John Wilkins.*"

In reply to this the plaintiff wrote as follows:—

"*Stroud, February* 13th, 1818.

"We now confirm your sale to Messrs. *Carver* and *Peet*, twenty bags (marks given) at 5*s.* 5*d.* per lb., acceptance at

1822.
HOLROROW
v.
WILKINS.

eight months, and fourteen days to weigh. If you cannot procure from them acceptances of approved houses (which we should prefer), we will take your guarantee for one half the amount, giving you 1*l.* per cent. upon that half; for, though we have no cause to doubt the stability of those gentlemen, their bills having been very regularly honoured, yet as wool runs to no trifling amount, and as we have still a considerable acceptance of theirs, which has yet some months to run, we should rather not go too deep upon their security alone."

The plaintiffs then delivered the wool, and on 26th *February* drew upon Messrs. *Carver* and *Peet* a bill of exchange for the amount (1122*l.* 12*s.*), eight months after date, which was accepted by the latter, and made payable at a banking-house in *London.* The bill would become due on the 29th of *October.* About the month of *September* in the same year Messrs. *Carver* and *Peet* became irregular in their payments, and partially suspended them. On the 22d of *September,* the plaintiffs, for the first time, after the sale of the wool, wrote to the defendant, acquainting him of their apprehensions for the solvency of *Carver* and *Peet,* and requesting his permission forthwith for them to draw upon him for half the debt guaranteed by him. The defendant replied, that he supposed they meant it as a hoax in applying to him for such a guarantee, and finally it was refused. It did not appear that the defendant had any thing to do with the transaction after the letters first above mentioned; and, though he was the broker, he was not employed in the weighing or delivering out of the wool, and no further notice was given to him of what took place between the plaintiffs and Messrs. *Carver* and *Peet* until he was called upon on his guarantee. Messrs. *Carver* and *Peet* became bankrupts in *January,* 1819, and the plaintiffs proved the amount of this debt under the commission. There had been a running account existing between the

plaintiffs and the defendant. The bill in question was not presented for payment when due, and there was no evidence to shew that Messrs. *Carver* and *Peet* had not assets in the hands of their bankers to take it up, had it been presented. No tender had been made to the defendant of the one per cent. commission for the guarantee; but the action was brought for one half the price of the wool, minus the defendant's brokerage and commission. Under these circumstances it was objected at the trial, that the plaintiff could not recover unless the bill had been presented at the place where it was made payable; and, if dishonored, that notice of the dishonor should have been given to the defendant; but the learned Judge over-ruled the objection, and the plaintiff had a verdict, with liberty to the defendant to move to enter a nonsuit.

Denman, C. S., now moved accordingly for a rule to shew cause why the verdict should not be set aside, and a nonsuit entered. The defendant in this case could not be liable upon his guarantee until the plaintiffs performed certain conditions precedent. It appears from the facts of the case, that after the plaintiffs' letter to the defendant on the 13th of *February*, 1818, the latter had nothing farther to do with the transaction. The completion of the sale by weighing and delivering, and the acceptance of the bill, was without his privity or knowledge. No notice was given to him of what had taken place until the plaintiffs, in the month of *September*, insisted upon his liability as guarantee, and then before the bill had become due. Under such circumstances the defendant could not be liable, at all events, until the bill had become due and was dishonored, and the defendant had notice of the dishonor; nor until they had tendered him the commission of 1*l.*, which was the consideration of the guarantee. These were conditions precedent, and must have been performed before the plaintiffs right of action could accrue. It was not indeed proved

1822.
HOLBOROW v. WILKINS.

that the bill, if presented, would have been paid; but the contrary was not proved; and therefore the presumption was as strong one way as the other. The whole transaction between the plaintiff and *Carver* and *Peet* was fair and regular; the bill was given bonâ fide, and not as an accommodation bill; payments were made by Messrs. *Carver* and *Peet* as late as the 12th of *September*; and as no notice was given to the defendant of the dishonor of the bill, he could not have any means of knowing of and preparing for the demand made upon him by the plaintiffs, until the moment when they proposed to draw upon him for the amount. The justice of the case was strongly on the side of the defendant; and in point of law, as no notice had been given of the dishonor of the bill, and no exertions made to obtain payment of it, the plaintiffs could not maintain the present action. He relied on *Phillips* v. *Astling* (a) and *Murray* v. *King* (b), and cited *Bickerdike* v. *Bollman* (c).

ABBOTT, C. J.—The present case is perfectly distinguishable from both the cases which have been relied upon in support of this application. In *Phillips* v. *Astling* the insolvency of the drawers of the bill took place *subsequently* to the period when the bill became due, and there was no evidence that the bill, if presented, would not have been paid. In *Murray* v. *King* the guarantee was to pay the bill itself, if it should not be paid by the acceptor. In the present case the insolvency of the acceptors takes place *before* the bill becomes due, and the guarantee is to secure one half of the amount of the debt, without any reference to the bill itself. It has been decided repeatedly, but particularly in the cases of *Warrington* v. *Furber* (d) and *Swinyard* v. *Bowes* (e), that a guarantee of a debt secured upon a bill of exchange, to which he is not a party, is not entitled to

(a) 2 Taunt. 206.
(b) 5 Barn. & Ald. 165.
(c) 1 T. R. 405.
(d) 8 East, 242.
(e) 5 M. & S. 62.

notice of the dishonor of the bill; for "the same strictness of proof is not necessary to charge a guarantee, as would be requisite to support an action upon the bill itself." Then what is the conduct of the defendant in this case? He enters into a guarantee of half the debt; the debtors are notoriously insolvent; and when called upon to perform his guarantee, he repudiates his engagement altogether, and denies his liability. I think there is no ground for disturbing the verdict.

Holroyd, J. (a)—I am of the same opinion. This case is not to be governed by the rules applicable to bills of exchange. There is an old case, in Lord *Mansfield*'s time, where a person paid away a bill and refused to indorse it, but he gave an undertaking to be answerable for the payment when it became due. There was an objection as to the want of notice of the dishonor, he being the indorser; but the Court said that notice was not necessary in such a case; and the distinction taken was, that, by the custom of merchants, the indorser of the bill was not entitled to notice, unless he put his name upon it. But, independently of the custom of merchants, if *A.* undertakes to guarantee the payment of the debt of *B.*, he is bound to see that *B.* does pay. The undertaking in this case is, not that the defendant will pay the bill, but that he will pay half the amount of the money for which the goods are sold. Here the vendees of the goods have become in fact bankrupts, and they had stopped payment before the bill became due. Of this circumstance the defendant received notice from the plaintiffs, and they had a right to resort to him on his guarantee, without reference to the question, whether the bill would be productive or not. I think, therefore, that in this case the plaintiff is liable upon his guarantee. The circumstance of *Carver* and *Peet* becoming insolvent before the bill became due, makes the whole difference between this and the cases which have been cited.

(a) *Bayley*, J. was absent.

1822.
HOLBOROW
v.
WILKINS.

BEST, J.—The plaintiffs were not bound to speculate upon the chance of the bill being paid when it became due. The moment they hear that *Carver* and *Peet* have stopped payment, they give notice to the defendant of the circumstance, and call upon him on his guarantee, which I think they had a right to do. Presenting the bill when it was due would have been a nugatory act, because it would have been presenting it to persons who were unable to pay. But supposing it had been presented and dishonored, the defendant would not have been entitled to any notice of the dishonor, because he was no party to the bill, and he did not come within the rule, which, by the custom of merchants, requires notice to be given to the indorser.

Rule refused (*a*).

(*a*) Vide *Bailey* v. *Scholefield*, 1 M. & S. 338; and *Rowe* v. *Young*, 2 Brod. & Bing. 165.

Thursday,
Nov. 14.

In the Matter of GEORGE JAQUES.

By statute 22 *Geo.* 2. c. 46. s. 11. it is enacted, "that if any sworn attorney or solicitor shall suffer his name to be used by an unqualified person, to enable him to practice as an attorney or solicitor, and complaint shall be made thereof in a *summary way, and proof made thereof on oath to the satisfaction of the Court*, such attorney or solicitor shall be struck off the roll"; and by the same section it is enacted, "That in that case, *and upon such complaint, and proof made as aforesaid*, it shall be lawful for the Court to commit such unqualified person so acting or practising as aforesaid to the prison of the said Court for any time not exceeding one year:"—Held, that a person brought within the latter branch of the section, upon affidavit of his offence, was not entitled to have the witnesses in support of the charge examined *vivâ voce*.

After the matter had been referred in such case by consent of counsel, to the Master of the Crown Office, who reported the party in contempt, the Court allowed the latter to bring the whole of the case under their own consideration, when brought up to be committed.

IN *Trinity* Term a rule was obtained, calling upon this person to shew cause why he should not be committed to the prison of this Court, for a period not exceeding one year, for practising in the name of *Henry Thackeray*, an admitted attorney of the Court, without being duly qualified, contrary to the provisions of 22 *Geo.* 2. c. 46. s. 11.

1822.

In Re JAQUES.

On a subsequent day in the same Term the matter was referred to the Master of the Crown Office, with the consent of counsel on both sides, to investigate the malversation imputed to the defendant. The substance of the charge against the defendant was, that he had, in collusion with *Thackeray*, practised as an attorney in the name of the latter, to whom he had for a considerable period of time paid a weekly stipend or douceur of one guinea for the privilege. The case was fully investigated before the Master upon affidavits filed on both sides, and upon a view of the defendant's book of accounts, which the Master required to be exhibited to him for inspection. In this Term the Master reported the defendant in contempt, and that the charges imputed to him were fully established.

Brougham, on a former day, prayed, upon the Master's report, that the defendant be committed accordingly for his contempt.

The defendant being now asked if he had any thing to urge why he should not be committed forthwith pursuant to the statute, he claimed the privilege, and was allowed it, of going again into the matters of the affidavits upon which the Master had pronounced his opinion. He then submitted, in point of law, that the Court had no authority to found a judgment in this case upon affidavit, and that the witnesses to support the charges against him ought to have been examined vivâ voce, in order that he might have the opportunity of cross-examining them, touching the matters to which they deposed; and he referred to *Rex* v. *Vipont* (a), as an authority in principle, supporting the argument. This proposition, he insisted, was more applicable to his case than to that of an admitted attorney, who, being an officer of the Court, might be subjected to a summary jurisdiction in that character. He himself stood in the situation of a

(a) 2 Burr. 1163.

1822.

In Re Jaques.

stranger to the Court, and therefore was entitled to the common law protection which was thrown around every individual accused of a crime, namely, that of trial by Jury, and the opportunity of confronting his accusers face to face. This was a summary proceeding, depriving him of the ordinary means of defence in a criminal matter, and therefore he submitted that the Court had no authority to deal with the case contrary to the accustomed mode in criminal proceedings. Other topics were then urged to the clemency of the Court, relating to the circumstances and condition of the defendant.

The Court deliberated upon the case, and

Abbott, C. J. delivered judgment:—The Court is called upon in the discharge of its public duty to administer the law as it is declared by an act of parliament. The statute 22 *Geo.* 2. c. 46. s. 11, upon which this proceeding is founded, recites, that "whereas divers persons who are not examined, sworn, or admitted to act as attornies, or solicitors, in any court of law or equity, do, in conjunction with, or by the assistance or connivance of certain sworn attornies and solicitors, and by various subtle contrivances, intrude themselves into, and act and practice in the office and business of attornies and solicitors, to the great prejudice and loss of many of his Majesty's subjects, and the scandal of the profession of the law;" and then proceeds to enact, "that if any sworn attorney or solicitor shall act as agent for any person or persons, not duly qualified to act as an attorney or solicitor, or permit or suffer his name to be any ways made use of upon the account, or for the profit of any unqualified person or persons, thereby to enable him or them to appear, act, or practice in any respect as an attorney or solicitor, knowing him not to be duly qualified, and complaint shall be made thereof in a summary way to the Court from whence any such process did issue, and proof made thereof, upon oath, to the satisfaction of the Court

that such sworn attorney or solicitor hath offended therein as aforesaid, then and in such case every such attorney or solicitor so offending shall be struck off the roll, and be for ever after disabled from practising as an attorney or solicitor; and in that case, and upon such complaint and proof made as aforesaid, it shall and may be lawful, to and for the said Court to commit such unqualified person so acting or practising as aforesaid, to the prison of the said Court for any time not exceeding one year." Under this act of parliament an application was made to the Court, founded on affidavits, charging a person of the name of *Thackeray* with having permitted a man, not being an attorney, to act in his name, and the person now before the Court being pointed out as the offender in that respect, a rule was granted, calling upon *Thackeray* to shew cause why he should not be struck off the roll, and *Jaques* to shew cause why he should not be committed to the prison of this Court for such his contempt. That application was founded upon affidavits, and the parties accused were allowed to present affidavits on their own behalf, and to offer such depositions as they thought fit and necessary to rebut the charges. It is now alleged that this is not the course of proceeding which ought to have been adopted; but that instead thereof the witnesses should have been examined vivâ voce, as in cases before Justices of the Peace under proceedings to conviction on penal statutes, according to what was laid down in the case of *Rex* v. *Fipont*. This Court, however, never examines witnesses vivâ voce in cases brought before it in banc, but always discusses matters upon affidavit. Indeed, considering that our jurisdiction extends over the whole kingdom, it would be impossible, in the exercise of that jurisdiction, to have persons brought from all parts of the country before us to be examined vivâ voce in every matter submitted to our consideration. There is therefore no ground for the objection which has been taken to the course of proceeding in this case. If such an objection

1822.

In Re JAQUES.

were allowed, it would open a door for the greatest inconvenience, confusion, and irregularity. The course which has been adopted is best calculated for the administration of justice in such a case, and is perfectly fair as far as it respects the interest of the party charged. In answer to the accusation preferred against him, he has the opportunity of exhibiting his own affidavits, and having his own allegations taken into consideration on oath, as to the truth or falsehood of the accusation. This case was originally heard by counsel on both sides. With the consent of counsel it was thought fit that the matter should be referred to the Master of the Crown Office, and it was accordingly referred for his investigation, and he finding, that in one of the allegations against the defendant allusion was made to a book in his possession containing entries, fortifying the allegations, he desired to have that book produced. The Master could not have done justice between the parties unless the book was produced, and a full investigation having taken place before him, he made his report to the Court against both parties. Upon that report the Court ordered Mr. *Thackeray* to be struck off the roll of attornies, and ordered that the party now before us should shew cause why he should not be committed. It was objected, that in a matter of this kind the Court ought not to be contented with the report of their own officer, but should examine into the case themselves. The Court, yielding to that suggestion, allowed as many of the affidavits to be read as the defendant thought fit, and one of the Judges has taken the pains to read through all the affidavits on both sides, and has directed the attention of the rest of the Court to the particular grounds of allegation on the one side, and to the matters of defence on the other, and we are all of opinion that the charge imputed to the defendant is satisfactorily made out. We are, therefore, bound to perform our duty, and to proceed according to the directions of the act of parliament in such a case, namely, to commit the party to the

prison of this Court for any time not exceeding twelve months. The Court has attended to all the circumstances of the case, and, in the discharge of their public duty, they are bound to say, that in a case so clearly established, some punishment should be imposed upon the party for his offence. The rule which the Court pronounce is, that the defendant be committed to the prison of this Court for six calendar months.

The defendant was committed accordingly.

MACPHERSON v. LOVIE.

Thursday, Nov. 14.

An affidavit to hold to bail, stating "that the defendant is indebted to the plaintiff in the sum of 1000*l.* upon and by virtue of a certain memorandum in writing, bearing date, &c. and signed by the defendant, whereby he promised plaintiff, that when he returned in the month of *March* or *April* then next, he would marry her, or pay her the sum of 1000*l.*" without shewing any mutual consideration on the part of the plaintiff, to sustain the defendant's promise, is insufficient.

MARRYAT moved for a rule to shew cause why the bail-bond given by the defendant in this case, should not be delivered up to be cancelled, on the ground of the insufficiency of the affidavit to hold to bail. The defendant had been arrested in *Trinity* vacation, upon an affidavit, stating "that the defendant was justly and truly indebted to the plaintiff in the sum of 1000*l.*, upon and by virtue of a certain memorandum in writing, bearing date the 19th of *October*, 1821, and signed by the defendant on the 21st day of *October* in that year, whereby he did promise plaintiff, that when he returned in the month of *March* or *April* then next, he would marry her, or pay her the sum of 1000*l.*; that although the defendant did, in the said month of *March*, return, and she was then ready and willing to intermarry with him, the defendant; and the said months of *March* and *April* being the time appointed for the said defendant to marry plaintiff as aforesaid, or pay her the said sum of 1000*l.*, have long since elapsed, yet defendant (although often requested so to do) hath not as yet married plaintiff or paid her the said sum of 1000*l.*, or any part thereof, and the same remains wholly due and unsatisfied; that no offer

1822.
MACPHERSON v. LOVIE.

has been made to pay the said sum of 1000*l.*, or any part thereof, in any note or notes of the Governor and Company of the Bank of *England*, expressed to be payable on demand." The objection to this affidavit was, that it did not state any promise of marriage on the part of the plaintiff, which, it was contended, was requisite as a consideration to bind the defendant in his promise. He insisted that it was necessary to shew some consideration on the part of the plaintiff to authorize her to hold the defendant to bail. Mutuality of promise is an essential circumstance in the affidavit to hold to bail. For instance, an affidavit of debt, for money lent, and for goods sold and delivered, and for work and labour, is insufficient, if it omit to state that it was "at the instance and request" of the defendant, although it state that it was "to and for his use, and on his behalf." *Durnford* v. *Messiter* (a). So, an affidavit of debt, stating that defendant was indebted to the plaintiff in so much money for goods sold and delivered (not saying by the plaintiff) to the defendant, is insufficient. *Taylor* v. *Forbes* (b). In the case also of *Brown* v. *Garnier* (c), it was held, that an affidavit to hold to bail for the hire of carriages, hired to the defendant and for work and labour done for the defendant, without adding "at his request" was insufficient. Now, in this case there was no mutuality of promise stated, but simply an allegation that the defendant was indebted to the plaintiff in the sum of 1000*l.*, upon a certain memorandum in writing, whereby he promised, that when he returned, in the month of *March* or *April*, he would marry her or pay the sum of 1000*l.* Such an affidavit, upon the authorities cited, was clearly insufficient.

Adolphus, contrà, shewed cause in the first instance. This affidavit to hold to bail is sufficient, inasmuch as the plaintiff swears positively to a sum of money being due to

(a) 5 M. & S. 446. (b) 11 East, 315. (c) 6 Taunt. 389.

her from the defendant. This being so, the Court will infer mutuality of promise. Looking through all the decided authorities, no case has gone the length contended for on the other side. The cases which have been cited, were all cases where there was an absence of any cause of action whatever which could create a liability between the plaintiff and defendant. They all turned upon this proposition, namely, that no contract was stated upon the face of the affidavit to enable the plaintiff to hold the defendant to bail. One was a case where the plaintiff swore that the defendant was indebted to him for money laid out, paid, and expended for his use, without going on to state "at his request." Now, a deponent might safely make such an affidavit without incurring any risk of an indictment for perjury. The case thus put was clearly defective for uncertainty, inasmuch as it did not convey sufficient information to the defendant as to the nature of the debt for which he was held to bail. But in the present case, every thing is stated in the affidavit to enable the defendant to know distinctly upon what contract the plaintiff sought to establish his liability. It cannot be objected that he does not sufficiently know for what cause of action he is held to bail. The affidavit gives him distinct knowledge of the ground of action, and every thing is stated that ought to be stated to enable him to know what is the plaintiff's demand. In the first place, there is a positive oath that he is indebted to the plaintiff in the sum of 1000*l.*, and then it states what the cause of action is for which he is liable. Whether there be, or be not, any mutuality of engagement, is immaterial for this purpose; the question being, whether there is sufficient matter disclosed upon the face of the affidavit to shew that the defendant is liable to her in an action for a breach of promise of marriage. The defendant here has fixed the amount of damages at the sum of 1000*l.*; and as there is sufficient certainty in the statement of the cause of action, there seems to be no sensible reason why he should not be held to bail. Without entering into

1822.

MACPHERSON v. LOVIE.

an enumeration of other cases upon such a subject, it is sufficient to state, that in *Hulton* v. *Eyre* (a) it was held, that in an affidavit to hold to bail for money paid for the use of the defendant, it is not necessary to state that it was "at the request" of the defendant. This case was certainly at variance with *Durnford* v. *Messiter*; but without relying upon the authority of any decided cases, it is quite sufficient to say, that the affidavit in this instance shews a contract by which the defendant pledges himself either to marry the plaintiff, or pay her a certain sum of money within a certain time.

Marryat, in reply, cited *Lowe* v. *Peers* (b), which was an action of covenant upon a marriage contract, under the defendant's hand and seal, and he relied upon the language of Lord *Mansfield* (c), who said, "that all these contracts ought to be looked upon with a jealous eye, even supposing them clear of any direct fraud;" and that learned Judge, speaking of the mutuality of the contract, said (d), "the deed does not import that she shall marry him; neither doth her acceptance of it import any such thing. It does not follow from her acceptance of the deed, that she either understood he meant to bind himself to marry her, or that she engaged to marry him." This was an authority to shew the importance of setting forth the mutuality of the contract, and the affidavit in this instance being defective in so material a circumstance, the defendant could not be held to bail.

ABBOTT, C. J.—I am of opinion that the affidavit in this case is insufficient. The effect of the decisions upon this subject is, that the Court can take nothing by intendment upon the construction of an affidavit of this kind, and that unless the affidavit shews clearly a cause of action, the

(a) 1 Marsh. 315. S. C. 5 Taunt. 704.
(b) 4 Burr. 2225.
(c) 4 Burr. 2230.
(d) Ibid. 2232.

party ought not to be required to give bail. In this case, the promise of marriage, though it is in writing, does not appear to be under seal. It is obvious, that in an action upon such a promise, no declaration could be framed without alleging that the promise to pay this money was in consideration of a promise on the part of the plaintiff to marry the defendant, or some other consideration to sustain the promise on his part. As no action could be maintained without alleging such consideration, and as this affidavit does not disclose this necessary circumstance to establish a cause of action against the defendant, we think the rule prayed for must be granted.

The rest of the Court concurred.

Rule absolute (*a*).

(*a*) Vide *Mackenzie* v. *Mackenzie*, 1 T. R. 716. 8 Ibid. 338. *Ford* v. *Laror*, 3 East, 110. *Purkis* v. *Sween*, 7 Ibid. 194. *Cathrow* v. *Hagger*, 8 Ibid. 106. *Symonds* v. *Andrews*, 5 Taunt. 751. *S. C.* 1 Marsh. 317. *Bliss* v. *Atkins*, id. 756. *Fenton* v. *Ellis*, 6 Taunt. 192; and *Waters* v. *Joyce*, ante, vol. i. 150.

PARKER v. BENT.

Thursday, Nov. 14.

The defendant was arrested, and executed a bail-bond by the initials of his christian names only, as the acceptor of a bill of exchange, in which his initials only appeared: Held, that the bail-bond ought to be cancelled, but without costs.

THIS was a rule calling on the plaintiff to shew cause, why the bail-bond in this case should not be delivered up to be cancelled, and the defendant discharged on filing common bail. It was an action on a bill of exchange, accepted by the defendant by the name of "*W. P. Bent*," his christian names being *William Partington*. He was arrested by the initials of his christian name only, and the bail-bond was executed in like manner, and the question was, whether this was an irregularity, entitling the defendant to be discharged on entering a common appearance?

1822.

PARKER v. BENT.

Chitty, for the defendant, relied upon the case of *Reynolds* v. *Hankin* (*a*), where it was held, that the arrest of a defendant described in a testatum special capias, and in the affidavit to hold to bail, by the initials of his christian name only, was irregular.

Littledale, contrà, insisted, that as the defendant had accepted the bill of exchange by the initials of his christian names, he might be arrested by such a description of himself.

Per Curiam.—After the decision of the case of *Reynolds* v. *Hankin*, which was maturely considered, we are bound to act upon it in the present instance. Nothing could have been more easy than to have asked the defendant what were his christian names at the time he was arrested, and then the bail-bond might have been filled up with those names. The bail-bond in this case must be delivered up to be cancelled, but without costs.

Rule absolute, without costs (*b*).

(*a*) 4 Barn. & Ald. 536.

(*b*) Vide *Howell* v. *Coleman*, 2 Bos. & Pul. 466. In *Turner* v. *Colville*, and *Morland* v. *Same*, Mich. 1820, in *K. B.*, the Court, under circumstances similar to the present, made the rules absolute.

HOFFMAN and Another *v.* HEYMAN.

In a contract for the sale of 641 hogsheads of tobacco, then on board a vessel bound from *A.* to *B.*, it is stipulated "that one-fifth of the contract price shall be paid in ready money, and that *for the other four-fifths the sellers are to look to their correspondents*, Messrs. *D.*, of *B.*, *to whom the property goes consigned.* It is nevertheless understood between the parties, that interest is to be calculated as if the sale was made at two and three months from final delivery; the buyers to have the benefit of the sellers' policy in case of average." One-fifth of the contract price is paid in ready money. On the arrival of the tobacco at *B.*, it meets with an unfavourable sale, and a loss of two-fifths of the estimated value takes place:—Held, that the buyer is liable to the seller upon this contract, for the amount of such loss.

THIS was an action of special assumpsit to recover the balance of a sum of money alleged to be due upon a con-

tract for the purchase of 641 hogsheads of tobacco. Plea, Non-assumpsit. At the trial before *Abbott*, C. J. at the *London* adjourned Sittings after last *Trinity* Term, it appeared in evidence, that the plaintiffs were *American* merchants residing in *London*, and carrying on extensive transactions with the United States, and that the defendant was the surviving partner of the house of *Heyman*, *Walte*, and *Co.*, of *London*. In the month of *July*, 1820, a cargo of tobacco had been shipped, on the plaintiffs' account, from *America* to *Bremen*, consigned to their correspondents, Messrs. *Delius*. Whilst the vessel was upon her voyage the following contract, on which this action was founded, was entered into between the plaintiffs and the defendant, by a broker :—

" Bought of Messrs. *W*. and *T*. *Hoffman*, for account of Messrs. *Heyman*, *Walte*, and *Co*., about 641 hogsheads of tobacco, being the cargo of the *Ulysses*, from *George Town* (*America*), and now on her voyage to *Bremen*, at 58*s*. 6*d*. per hundred pounds, manifest weight, payable one-fifth in money, on or before *Saturday*, 5th *August*, and for the other four-fifths the defendants are to look to their correspondents, Messrs. *Delius*, of *Bremen*, to whom the property goes consigned. It is nevertheless understood between the parties, that interest is to be calculated as if the sale was made at two and three months from final delivery; the buyers to have the benefit of the sellers' policy in case of average.

" *London*, 28th *July*, 1820.

(Signed) " *George Scholey*."

The estimated value of the tobacco was 18,000*l*., one-fifth of which, 3,600*l*., was paid by the defendant in pursuance of the contract. The *Ulysses* arrived at *Bremen* on the 29th of *July*, being the day after the contract was entered into. The tobacco found an unfavourable market, and

1822.

HOFFMAN v. HEYMAN.

the result of the transaction was, that a loss of two-fifths of the estimated value ensued, and for that sum the action was brought. It was contended for the defendant, that by the very terms of the contract the claim of the plaintiff upon him was limited to one-fifth the amount of the cargo, which had been paid, and that the plaintiff had by those terms bound himself to look for the remainder to their correspondent at *Bremen;* in other words, he was to receive in addition to the sum of 3600*l.*, whatever the tobacco might realise when sold at *Bremen.* The Lord Chief Justice, however, was of opinion, that the plaintiff was entitled to recover, and the Jury, under his direction, found a verdict for the plaintiff accordingly.

Marryatt now moved for a rule to shew cause why the verdict should not be set aside, and a nonsuit entered. The plaintiff was bound by the terms of his contract, and, in point of law, they were insufficient to sustain the present action. What did the plaintiffs engage to do? To sell a certain quantity of tobacco, valued at 18,000*l.*, to be shipped to *Bremen;* to receive one-fifth of that sum from the defendant *here*, and to look for the rest to the consignees *there.* In a word, he entered into a speculation, which, if successful, would pay him a profit, and, if unsuccessful, might subject him to a loss. The speculation failed, and a loss of two-fifths, or 7,200*l.* ensued. But what claim had he upon the defendant to recover this loss, either upon the face of the contract, or in common justice? He submitted that the action was not maintainable, and that the plaintiff ought to have been nonsuited.

ABBOTT, C. J.—I had no doubt upon this subject at the trial, and I am equally decided in my opinion now. The plaintiff sells at a specific price; the tobacco is to be shipped to a foreign market; if upon its sale there it obtains a profit beyond the contract price, the defendant is to have

the benefit of that profit; if, on the contrary, it incurs a loss, the defendant is to sustain that loss. It is quite clear to me that this was the intention of the parties, and that this is the true construction of the contract; and, consequently, that the plaintiff was entitled to recover the full amount of the loss upon the sale.

BAYLEY, J.—Here is a contract for a sale of tobacco at a settled price; the only question is as to the mode in which that price is to be paid, and I take it to be this,—one-fifth is to be paid down immediately in cash, and the residue is to come from the consignees abroad, if they can realise so much. They sell the cargo, and the result is a loss. Who is to sustain that loss? Unquestionably the defendant, who is the buyer, because there is no stipulation to the contrary on his part, and there is a stipulation for a fixed price on the part of the plaintiff. The construction endeavoured to be put upon the contract is one which the plaintiff could never have contemplated; for it puts him in a situation where he may sustain loss, but cannot, by any possibility, derive profit. The foreign arrangement was a mere mode of payment adopted for the convenience of the defendant, and as the consignees abroad were not able to complete the contract price, it is quite clear that he must.

The rest of the Court concurred.

Rule refused.

1822.

Thursday, Nov. 14.

PRING *v.* CLARKSON.

A., the payee of a bill of exchange for 87*l.* having indorsed it to *B.* for valuable consideration, and the bill being dishonoured, *C.*, the acceptor, sends another bill for 126*l.* (which has some time to run) to *A.* who takes up the first bill by means of the second, receives the difference in discount, and indorses the first bill again to *D.*, who sues the drawer before *C.*'s second bill becomes due:—Held, that taking the second bill did not amount to giving time and a new credit to the acceptor of the first, so as to discharge the drawer, who was no party to the transaction, unless there was evidence of an express *consent* on the part of *A.*, the payee, to give time, and not to sue upon the first bill until the second was at maturity.

ASSUMPSIT by the indorsee against the drawer of a bill of exchange, dated 17th *March*, 1822, accepted by one *J. T. Thompson*, payable to the order of Messrs. *Gidden* and *Son*, for the sum of 86*l.* 8*s.* 7*d.*, four months after date. Plea, Non-assumpsit, and issue thereon. At the trial before *Abbott*, C. J., at the *London* Sittings after last Term, it appeared in evidence that the bill in question was drawn and accepted as above-mentioned for value. When it became due it was in the hands of a Mr. *Baker*, of *Abingdon*, in *Berks*, to whom it had been indorsed by Messrs. *Gidden* and *Son*. The bill having been dishonoured, notice was given to all the parties upon it. Immediately afterwards, *Thompson* (the acceptor) sent another bill of exchange, accepted by a third person, and indorsed by *Thompson*, in a letter to *Gidden* and *Son*, the payees, for the sum of 126*l.*, which bill had then some length of time to run. This bill *Gidden* and *Son* discounted with Mr. *Baker*, took up the bill in question from him, and received the difference in cash. Upon receiving the bill in question, *Gidden* and *Son* indorsed it, for valuable consideration, to the plaintiff, who was then ignorant that it had been already dishonoured, and he brought the present action upon it against the defendant, as drawer, before the bill for 126*l.* became due. It did not appear that *Gidden* and *Son* had in any way undertaken not to sue upon the bill in question, or to give *Thompson* time. The bill for 126*l.* (which was afterwards dishonoured) was merely remitted to them in a letter, without any stipulation whatever as to the other bill; and it appearing that the 126*l.* bill was not due at the time this action was commenced, it was objected that the defendant was discharged of his liability upon the 86*l.* bill, inasmuch as the taking of the 126*l.* bill from *Thompson* by *Gidden* and *Son*, was a giving time to the acceptor, so as to discharge the drawer.

At all events, it was insisted, that this action ought not to have been brought against the defendant, until the 126*l.* bill became due. The learned Judge thought the objection not tenable, and directed the Jury to find for the plaintiff, with liberty, however, to the defendant to move to enter a nonsuit.

Chitty, on a former day in this Term, moved accordingly, and, on the authority of *Gould* v. *Robson* (*a*), and *English* v. *Darley* (*b*), obtained a rule nisi.

Puller now shewed cause against the rule, and contended, that the direction of the learned Judge was perfectly correct, and that by no construction of law, could the circumstances of this case amount to a discharge of the defendant's liability upon this bill. The mere taking of the 126*l.* bill sent by *Thompson* to *Gidden* and *Son* in a letter, without any stipulation, could not be considered as a giving time to the former, so as to discharge the drawer of the present bill. The 126*l.* bill was sent to *Gidden* and *Son* without any condition or restraint whatever, and no communication had taken place between them, *Thompson*, or the defendant, importing a consent not to sue upon this bill until the other was due. Giving the circumstance of *Gidden* and *Son* having taken the 126*l.* bill, its fullest effect, it amounted to no more than the taking of a collateral security from *Thompson*, which certainly could not relieve the defendant from his liability upon the first bill. If this was no more than a collateral security, *Gidden* and *Son* were certainly bound by no obligation to wait the chance of its becoming available, and thereby waive their claim upon the defendant as drawer of the present bill. This case was perfectly distinguishable from *Gould* v. *Robson*. In that, the holder of the bill took part payment of the amount from the acceptor, and agreed to take a new acceptance from him for the remainder, pay-

(*a*) 8 East, 576. (*b*) 2 Bos. & Pul. 61.

1822.

PRING v. CLARKSON

able at a future date, and there it was very properly held, that the indorser was discharged, he being no party to the agreement. But here, the payees took no part payment of the bill in question from the acceptor; all they did, was to take a new bill from the acceptor, without any terms imposed as to the original bill, and there was nothing binding upon the plaintiff to forego his claim upon that bill against the drawer, until the second bill became due. This case must be treated merely as the case of a collateral security, in the event of the first bill not being paid, and therefore the verdict could not be disturbed. As to the case of *English* v. *Darley*, it did not bear upon the question in any way whatever. It was for the Jury to decide, as a question of fact, whether *Gidden* and *Son* had given time to the acceptor after the bill was dishonoured, and had consented not to sue upon it until the bill was paid, and they had negatived that question by their verdict.

Platt, on the same side, was stopped by the Court.

Chitty, in support of the rule. This case falls within the general principle, that if the holder of a bill of exchange gives time to the acceptor after it is dishonoured, the drawer is thereby discharged (*a*). The bill in question is drawn in the usual course of trade, and accepted by *Thompson*, who is primarily liable to pay it. When the bill, however, is dishonoured, instead of resorting to the defendants' liability at once, as the drawer, *Gidden* and *Son* enter into an agreement with *Thompson*, the acceptor, to take another bill for 126*l*., but not as a collateral security, (which is the fallacy in this case) for it was proved at the trial that the bill for 126*l*. was discounted by *Gidden* and *Son*, who received the difference between the amount of the 86*l*. bill in cash, from

(*a*) Vide *Tindal* v. *Brown*, 1 T. R. 167. *S. C.* 2 T. R. 186. *Rees* v. *Berrington*, 2 Ves. jun. 540. *Walwyn* v. *St. Quintin*, 1 Bos. & Pul. 652, 5. *English* v. *Darley*, 2 Ibid. 61; and *Clarke* v. *Devlin*, 3 Ibid. 363.

Baker; so that by this arrangement the 126*l.* bill becomes at once, not a collateral security, but an available bill, over which the indorsee had a complete power of control, and might send it into the world as a negociable instrument. Surely then, under these circumstances, this case comes within the general rule which discharges a drawer or indorser, by giving time to the acceptor. This amounts to a substantial mode of payment, by which *Gidden* and *Son* waive their right against the defendant as drawer of the first bill. To this arrangement the defendant is no party, and as the substituted bill is taken behind his back, *Gidden* and *Son* shew distinctly that they no longer look to the defendant. If this second bill had been given merely as a collateral security in the event of the defendant not being able to pay the bill in question, then possibly this argument would not hold good; but as *Gidden* and *Son* take the second bill from the acceptor, they shew that they look entirely to the acceptor's liability. Their conduct throws the defendant off his guard, and lulls him into security, by which he refrains from using that diligence which he would otherwise exert in looking to the acceptor himself for an indemnity. At all events, the right of action against the defendant is suspended until the second bill is due, inasmuch as *Gidden* and *Son* had passed that bill away, and had thereby bound themselves, and every other person deriving title from them, not to sue upon the first bill until the second had been dishonoured. If these infirmities would be fatal to *Gidden* and *Son*'s right to sue, it follows as a consequence, that the title of the plaintiff, their indorsee, is infected with the same objections. The question had not been left to the Jury, whether, in point of fact, *Gidden* and *Son* had consented to give time to the acceptor, by taking the second bill, because this became a question of law, necessarily resulting from the facts. Whether *Gidden* and *Son* had given time to the acceptor, by taking this second bill and afterwards negociating it, is a question of law, and therefore the point need

1822.
PRING v. CLARKSON.

not have been left to the Jury as a question of fact. He relied upon *Gould* v. *Robson*, as an authority not distinguishable in principle from the present case; and he cited *Kearslake* v. *Morgan* (a), to shew that the indorsement of the second bill of exchange would have been a good plea in bar to the present action.

Abbott, C. J.—The question in this case is, whether *Gidden* and *Son*, by taking the second bill, did in fact consent not to sue upon the first until the second was due. That was a question for the Jury; but it was not so put to them on behalf of the defendant. It was put to me entirely as a question of law, and I was of opinion, that unless they consented not to sue upon the bill in question until the bill for 126*l*. became payable, the defence set up would not be available. The safest course in this and similar cases, is to rely upon some broad and plain rule. The broad and plain rule hitherto laid down in such cases is this: If the holder of a bill of exchange consents to give time to the acceptor, he thereby discharges other parties to the bill. I am of opinion in this case, that the defendant is not discharged merely by the fact of *Gidden* and *Son* taking another security, without any proof of a consent on their part not to sue upon the first until the second bill became due. No such consent was proved, and therefore I think the case must be governed by that circumstance.

Bayley, J.—I am of the same opinion. This was more a question of fact than of law, namely, whether at the time when *Gidden* and *Son* took the second bill of *Thompson*, they consented to delay their remedy upon the first until the second became due. If that fact had been satisfactorily established, it would undoubtedly have been a discharge of the defendant; but as that fact has not been proved, it makes all the difference in the case. I see no reason why *Gidden*

(a) 5 T. R. 513.

1822.

PRING
v.
CLARKSON.

and *Son* should not have been at liberty to take the second bill as a collateral security. There is nothing before us to shew that *Gidden* and *Son* did in fact agree to give time to the acceptor, but we are called upon to draw this inference from the mere circumstance of this bill having been given by the acceptor. No such inference can be drawn, unless it arises from the fact. The mere sending the second bill by *Thompson* does not restrain *Gidden* and *Son* from negociating or suing upon the first, unless there is an express consent for that purpose. If the facts proved in this case amounted to giving time to the acceptor, the argument which has been urged on the part of the defendant would have been perfectly correct; but that is a question of fact, and there is nothing to support it in the case. The circumstance of *Gidden* and *Son* having discounted the second bill, and sending it forth into the world, makes no difference; for if, at any period before it became due, they had any reason to believe it would have been dishonoured, they had a right to take up the bill again, and send it back to *Thompson*. My opinion in this case is founded upon the want of proof that *Gidden* and *Son* had bound themselves not to sue upon the first bill until the second was at maturity.

HOLROYD, J., and BEST, J., concurred.

Rule discharged (*a*).

(*a*) There was another objection taken in this case for the defendant, which had been abandoned, namely, that the bill was not indorsed to the plaintiff until after it became due and was dishonoured; as to which point, see *Chalmers* v. *Lanion*, 1 Campb. 383. *Young* v. *Wright*, Ibid. 139. *Charles* v. *Marsden*, 1 Taunt. 224. *Newby* v. *Smith*, 2 Esp. 539. *Smith* v. *Knox*, 3 Ibid. 46, and Hammond, 187.

1822.

Thursday,
Nov. 14.

Service of the declaration in ejectment upon the wife of the tenant in possession, without stating that it was served at the husband's house, or on the premises, insufficient to support a rule for judgment against the casual ejector.

RIGHT, on the Demise of BOMSALL v. WRONG.

THE declaration was served upon the wife of the tenant in possession, but the affidavit did not state that it was served at her husband's house, or on the premises.

Bailey moved for judgment against the casual ejector, and submitted, on the authority of *Doe* v. *Bayliss* (a), that this was good service; but

BAYLEY, J., said, the case did not bear him out. The affidavit must at least state some circumstances from which the Court might reasonably conclude that the wife, upon whom the service was made, was living with the tenant in possession at the time, so that notice to her would be notice to him, and *Doe* v. *Bayliss* laid that down.

Rule refused (b).

On a subsequeut day an amended affidavit being produced, stating the service to be on the wife of the tenant in possession, and that they were then living together *as man and wife*, the service was held good, and the rule granted.

(a) 6 T. R. 765.

(b) In a case, *Doe*, dem. *Wood* v. *Roe*, on a subsequent day service of the declaration, upon the premises, upon a woman who described herself as mother-in-law of the tenant in possession, and who some days after the service acknowledged that she had given the declaration to him, was held not to be good service.

1822.

Thursday, Nov. 14.

SMITH *v.* HOWARD and Another.

The allowance of a writ of error does not stay execution, unless the defendant perfects as bail in time.

MOTION to set aside the execution in this case for irregularity, on the ground that the execution was sued out after the service of the allowance of a writ of error. The answer to the irregularity was, that though the allowance of a writ of error had been served before execution, still as the defendants had not afterwards perfected their bail in time, the plaintiff was entitled to treat the allowance of the writ of error as a nullity.

The Court was of this opinion, and therefore discharged the rule, with costs.

Storks for the plaintiff, *Chitty* for the defendants (*a*).

A writ of error is no superdeas of execution, unless bail in error be put in, and notice thereof given within the time limited by the rules of the Court.

(*a*) *Attenbury* v. *Smith*, Mich. 1821. This was a motion to set aside an execution, sued out and executed after the allowance of a writ of error. It appeared that bail in error was regularly put in within the four days after judgment, but notice thereof was not given until six days afterwards; and in the mean time the execution was sued out and executed.

The Court held, that a writ of error is no supersedeas of execution, unless bail in error be put in, and notice thereof given within the time limited for that purpose by the rules of the Court, namely, four days after judgment; and if execution be sued out after that time, and before notice of bail, the Court will not interfere to stay the proceedings upon it.

Rule discharged.

1822.

Friday,
Nov. 15.

Cox, Gent. one, &c. *v.* Coleridge and Another.

A person under examination before Justices of the Peace, on a charge of felony, has no right to have a legal adviser attending on his behalf, still less to cross examine the witnesses for the prosecution, and to examine opposing testimony to prove his innocence. The privilege, when allowed, is entirely a matter of discretion in the Justices.

Where an attorney of this Court was retained by a prisoner, charged with felony, to attend and give him his advice and assistance during his examination before Justices, and after notice to the latter that he attended upon such retainer for that purpose:—Held, that the Justices might forcibly turn him out of the justice-room, and exclude his presence during the investigation of the case. *Quære*, whether this rule applies where the decision of the Justices is final, as on convictions under penal statutes no appeal being given?

TRESPASS and assault. The first count of the declaration stated, that on the 1st *September*, 1818, defendants *James Coleridge*, Esq. and *George Smith*, clerk, with force and arms, made an assault on plaintiff, at *Ottery, St. Mary*, in the county of *Devon*, and seized and laid hold of, and caused and procured him to be seized and laid hold of, and forced and compelled him to go from and out of a certain room in a certain inn in *Ottery, St. Mary*, contrary to the laws and customs of this realm, and against the will of plaintiff, by means of which said several premises plaintiff was greatly hurt and injured, and was hindered and prevented from performing and transacting his necessary affairs and businesses by him at that time to be performed and transacted in the said room. Second count was for a common assault. The defendants pleaded, first, Not Guilty; second, that the assaults mentioned in the first and second counts were one and the same assault, and not other and different assaults, and that at the said time when, &c. they the said defendants were and still are two of the Justices of our lord the King, in and for the county of *Devon*, and so being such Justices, on the said 1st of *September*, in the year aforesaid, were assembled in the same room in the said first count mentioned, to take the information upon oath of the prosecutor, and the several witnesses, touching and concerning a certain felony before then charged to have been committed by one *George Brown*, and upon which charge the said *G. B.* was then in custody before them, and to examine the said *G. B.* being the party accused touching the same, and further to do and perform

there such things as should to them seem proper as such Justices aforesaid, according to the laws and statutes of this realm, and according to their office and duty as such Justices; and the said defendants further say, that plaintiff not having been summoned before them as a witness touching the matter then in examination, not being charged as a party concerned in the same, nor coming before them to testify any knowledge concerning the same, with force and arms, &c. wrongfully broke and entered into the said room, and intruded himself upon defendants; and thereupon defendants did civilly request plaintiff to leave the room, and not to intrude upon them, but plaintiff wholly refused to obey such request, and continued himself in the room intruding upon defendants for a long space of time, to wit, for the space of one quarter of an hour, in contempt of the said defendants as such Justices, and to the disturbance and violation of due order and decency in the administration of justice, and to the hindrance thereof; whereupon defendants did gently lay their hands upon plaintiff, in order to put him out of the room, and did then gently put him out of the same accordingly, as they lawfully might, for the cause aforesaid, doing him no hurt or damage thereby, which are the said supposed trespasses in the introductory part of this plea mentioned, and whereof plaintiff hath above complained against them, and this they are ready to verify, wherefore, &c. And, third, that the said room in the said first count mentioned, was a room in, and parcel of a certain common inn or public-house; and that plaintiff violently and unlawfully, with force and arms, broke and entered into the same, and intruded himself upon defendants, and disturbed them in the lawful and quiet possession and enjoyment of the same, and in the transacting of their lawful purposes therein; and thereupon defendants did civilly request and desire plaintiff to leave the room, to do which he wholly refused and still remained and continued therein, disturbing defendants, whereupon defendants did gently lay their hands upon him, in order gently to put him out of the

1822.

Cox
v.
Coleridge.

said room, and did gently put him out of the same as they lawfully might, doing him no hurt or damage thereby, which are the said supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained against them, and this they are ready to verify, wherefore, &c. Replication took issue on the first plea, and as to the second plea plaintiff replied, "that he, by reason of any thing by defendants in that plea alleged, ought not to be barred from having and maintaining his aforesaid action against them, because he saith, that before and at the said time, when, &c. he was and still is one of the attornies of the Court of our lord the now King, before the King himself, here, and well skilled in the laws, statutes, and customs of this realm, and that the said *G. B.* before the said supposed breaking, entry, and intrusion, in the said second plea mentioned, had been and was apprehended, and in custody under a certain warrant, under the hands and seals of defendants, charged with having committed the said supposed felony, and was about to be examined by defendants touching the same, whereupon the said *G. B.* stated to and informed defendants that upon the examination of certain witnesses, the entire innocence of the said *G. B.* in the premises would appear to defendants; and plaintiff further says, that defendants did thereupon discharge the said *G. B.* out of such custody, and permit and suffer him to go at large for the purpose of enabling him to bring such witnesses to be examined by and before defendants, at a time then prefixed to the said *G. B.* by defendants in that behalf, touching the said supposed felony; and plaintiff further says, that afterwards, and a little before the time so prefixed to the said *G. B.*, and a little before the said supposed breaking, entry, and intrusion, in the said second plea mentioned, said *G. B.* and the said last mentioned witnesses, being about to be examined by and before the defendants, touching the said supposed felony, and the said defendants being about to take such information as in the said second plea mentioned, he

the said *G. B.* being an illiterate person, and unskilled in the laws and customs of this realm, applied to and requested and retained plaintiff as such attorney, so skilled as aforesaid, to accompany him the said *G. B.* before defendants, and to assist him the said *G. B.* with his, plaintiff's, counsel, skill, suggestions, and advice, in making his the said *G. B.*'s defence before defendants to the said charge, and in clearing himself therefrom, and shewing his the said *G. B.*'s innocence in the premises, and in examining the said prosecutor and witnesses in the said second plea mentioned, and the said witnesses in this replication first above mentioned, being witnesses then and there capable of deposing to and establishing certain facts, from which would appear to defendants the entire innocence of the said *G. B.* in the premises, and that there existed no ground whatever for suspecting the said *G. B.* to have been guilty of the said supposed felony, or in any way connusant of or implicated in the same, and further to assist and advise the said *G. B.* in the premises as far as he plaintiff was by the laws, statutes, and customs of this realm authorized, enabled, and empowered to do; wherefore plaintiff having thereupon, as such attorney, then and there acceded to the said request, and accepted the said retainer of the said *G. B.*, did, as such attorney, for and on behalf of the said *G. B.*, and at his request, and upon his retainer as aforesaid, accompanied the said *G. B.* before defendants, and in so doing did necessarily enter into the said room for the purpose of assisting and advising the said *G. B.* touching the premises as aforesaid, and did thereupon inform and give notice to defendants that he then was such attorney, and that he had been and was so applied to, requested, and retained as aforesaid, and that he had then and there entered the said room for the purpose aforesaid, and continued therein from thence, until the defendants, of their own wrong, committed the said several trespasses in the introductory part of the second plea mentioned, in manner and form as plaintiff hath above thereof complained against them, and this plaintiff is ready to verify,

1822.
Cox
v.
COLERIDGE.

wherefore, &c. The replication to defendant's third plea was the same as to the second. Demurrer to the replication and joinder in demurrer.

Coleridge, in support of the demurrer. Two questions arise upon the pleadings in this case, first, Whether a person, who is under examination before Justices on a charge of felony, is entitled to legal advice and assistance? and, second, whether, supposing such a right to exist, there is such a connexion between an attorney and his client, as would justify the breaking and entering stated in these pleadings? It is unnecessary to dwell at any length upon the second question, the first, being the most important to the defendants on this record. The prominent question then is, whether a person under examination before Magistrates on a charge of felony, is entitled to legal assistance? No direct authority is to be found in the books upon this point. Two cases indeed have been recently decided in this Court, which deserve attention, as going nearly the whole length of the argument for the defendants; *Rex* v. *The Justices of Staffordshire* (a), and *Rex* v. *Borron* (b). In the first of those cases, the party under accusation was brought before the Magistrates, charged with an offence against the Game Laws, and the application to the Court was for a criminal information against the Justices, on the ground that they had deprived the parties accused of the advantage of legal assistance, by ordering their attorney out of, and keeping him excluded from, the Justice Room, during the hearing of the information; and *Bayley*, J. is reported to have said, on that occasion, "What right had the attorney to be there? his presence would only produce confusion and irregularity in the proceedings of the Magistrates. An attorney has no right to interfere with the duties of the Magistrate in his own Justice Room. An attorney has no right to be present." It is true that that was a motion for a criminal

(a) 1 Chit. 217. (b) 3 Barn. & Ald. 432.

information against the Justices, but it was refused on another ground, namely, the absence of any corrupt motive imputable to the Magistrates. If, however, that case be law, it goes the whole length of the present argument. Indeed, the case there is much stronger than the present, because the parties accused were then undoubtedly on their trial, under a penal statute, before the Magistrates, who were called upon to determine the whole of the case, and judicially to decide upon its merits. If any case could justify the interposition of a legal adviser, as matter of right, on behalf of the party accused, before Magistrates, probably no stronger instance could be put than that of an information on the Game Laws, because it might frequently happen, that in administering justice in such cases, questions of title and other points requiring skill in the law, would arise. But *Rex* v. *The Justices of Staffordshire*, decides that even in such a case an attorney has no right to be present aiding, assisting, and counselling a party on his defence before Magistrates. In the case of *Rex* v. *Borron*, it was decided, after mature deliberation, that in the investigation of a charge of felony before a Magistrate, an attorney is only, as a matter of courtesy, permitted, but has no right to be present; nor can he comment on the evidence so as to apply the law to it, unless he be requested by the Magistrate to give his opinion and advice upon the case. There, the application was on the part of the prosecutor's attorney, who not merely required the Justice to take the examination of certain witnesses, but also claimed leave to comment upon the evidence, in order to apply the facts to the law of the case, which the Justice would not permit him to do. From the whole analogy of the law in criminal cases, it should seem that the crown is to have the assistance of counsel, rather than the defendant. (*Bayley*, J. I apprehend, if a person, under charge before a Magistrate, has no right to the assistance of an attorney, it is clear that the prosecutor has no right to have an attorney present interfering with the investigation). This

1822.

Cox
v.
COLERIDGE.

question certainly, must be tried on principle, and the facts of the case must be considered with reference to that principle. In the first place, what was the condition of *George Brown* before the Magistrates, and in the second, what was the duty which the law imposed upon the Magistrates when he was brought before them? If the party accused was in such a situation as that an attorney could have nothing to do, a strong inference would necessarily arise, that he had no right to be present at the inquiry. The fact is, that *Brown* was brought before the Justices for examination only, and not for trial, and it was the duty of the Magistrates not to satisfy their minds of the whole of his guilt, but merely to ascertain whether there were sufficient grounds to put him on his trial. For the first of these propositions, it is hardly necessary, on the present occasion, to cite any authority, because it can hardly be said, that at the time in question, *Brown* was on his trial. Then, as he could not be considered as standing for his trial, what was the duty of the Magistrates on that occasion? Upon this point the authorities go farther than it is necessary to contend. In *Dalton's Justice*, c. 164. p. 377, it is laid down, that "if any person shall be brought before a Justice of the Peace, and charged with any manner of homicide, (other than that which shall be done in the ordinary execution of judgment) as if it were done se defendendo, or by casualty, which are not felonies, or done by an infant, a lunatic, or the like; yet it is the Justice's part, and safest for him to commit the offender to prison, or at least to join with some other in the bailment of him, (if the cause will suffer it) to the end the party may be discharged by a lawful trial. The like is to be done where any felony is committed, and one brought before the Justice of the Peace, upon *suspicion thereof, though it shall appear to the Justice that the prisoner is not guilty; for it is not fit that a man once arrested and charged with felony, (or suspicion thereof) should be delivered upon any man's discretion, without farther trial*." For this *Cromp.* 34, and *Lamb* 229,

1822.

Cox
v.
Coleridge.

are cited. (*Bayley*, J. Is it law at the present time, that though the Justice is satisfied that the prisoner is not guilty, it is his duty to commit him for trial?) It is not necessary on the present occasion to discuss this proposition, but the reason assigned for it is, "that it is not fit that a man once arrested and charged with felony, or suspicion thereof, should be delivered upon any man's discretion without farther trial." [I think that is an authority which professes too much.] In the same chapter, *Dalton* enters into a discussion as to the competency of witnesses in certains cases, and he says, "A man attainted of conspiracy or forgery, shall not be received to give evidence, or be a witness; but if one be brought before a Justice of the Peace, upon suspicion of felony, although the information against the prisoner shall be by such witnesses, yet it is safest for the Justice to take their information for the king, and to bind them over to give evidence, &c. and to commit the party suspected; and upon the trial to inform the Justices of gaol delivery concerning the credit of those witnesses." The next authority, which is entitled to very great weight, is 2 *Hale P. C.* c. 14. p. 120, where it is laid down, that "If a prisoner be brought before a Justice of the Peace, expressly charged with felony, the Justice cannot discharge him, but must bail or commit him, except it should happen that no felony has been committed, or that the fact does not amount to felony." In *Hawk. P.C.* c. 15. s. 1, it is laid down, "That wherever a person is brought before a Justice of the Peace, upon an accusation of treason or felony, he must be either bailed or committed, unless it manifestly appear, that no such crime was committed, or that the cause for which alone the party was suspected, was totally groundless, in which cases *only* it is lawful to discharge him without bail." The same doctrine is laid down in 4 *Blackstone's Commentaries*, c. 22. p. 296, All these authorities are founded upon the statutes 1 & 2 *P. & M.* c. 13, but it is not to be supposed that those statutes were intended to enlarge the powers of Justices of the Peace. It appears from reference to those statutes, and to *Lam-*

1822.
Cox
v.
Coleridge.

bard and *Staundford*, that they were the result of much consideration on the subject, and that they were passed for remedying the abuses which had grown up in allowing persons to be improperly admitted to bail under the statutes 1 *Ric.* 3. c. 3, and 3 *Hen.* 7. c. 3. What then are the duties which the Justice is required to discharge by 1 & 2 *P.* & *M.* c. 13. First, as to the examination; by s. 4. he is to take the informations of them that bring the prisoner before him, of the fact and circumstances of the felony, and the same, or as much thereof, as shall be material to prove the felony, shall be put in writing, and then he is to certify the examination so taken at the next general gaol delivery, to be holden within the limits of his commission. It is quite clear, therefore, what the duty of the defendants was in this case. What is the Justice to certify? He is to certify so much as is material to prove the felony, and there can be no occasion for any additional evidence, for it is put alternatively in s. 5. of the statute, which gives directions to the Coroner what he shall do in certain cases. The Coroner by that section, is to put in writing, "*the effect* of the evidence, given to the Jury, before him, being material;" and Lord *Hale*, in his P. C. b. 2. c. 8. p. 61, points out the difference between the examination to be taken by the Coroner and that by the Justice. He says, that by 1 & 2 *P.* & *M.* c. 13, "The Justices of the Peace are to put into writing the informations against the felon of the fact and circumstances thereof, or *so much thereof as shall be material to prove the felony*; but the Coroner is to put into writing, *the effect of the evidence given to the Jury before him, being material,* without saying *so much as is material to prove the felony,* but the whole evidence given, whether to prove or disprove the felony." In cap. 22. p. 157, the same learned writer again remarks upon the difference between the Coroner's Inquest and the Grand Jury. The Coroner is to hear both sides, and receive evidence from every quarter, but the Magistrates are not to do so, for he says, "The Coroner's

Inquest may, and must hear evidence of all hands, if it be offered to them, and that upon oath, because it is not so much an accusation or an indictment as an inquisition or inquest of office *quomodo J. S. ad mortem suam devenit*, though it be also true that the offender may be arraigned upon that presentment.* But the grand inquest before Justices of the Peace, gaol delivery, or oyer and terminer, ought only to hear the evidence for the king, and in case there be *probable* evidence, they ought to find the bill, because it is only an accusation, and the party is to be put upon his trial afterwards." Could an attorney at that time have claimed admission to the Justice's room as a matter of right, upon the examination of a person accused of a crime? In the first place, at that time, there was no process to bring the witnesses before the Magistrate who could speak on behalf of the prisoner, because the examination was confined to such as were witnesses for the Crown, and even then the Justices were not bound to go through the whole examination, inasmuch as they were only required to take as much evidence as they should think material to prove the felony, and certify the same to the Justices of oyer and terminer. If the prisoner had brought witnesses before the Magistrates at that time, to prove his innocence, it seems exceedingly doubtful whether the Magistrate could have sworn them, and if he could have done so, it seems still more doubtful, whether he could have received their evidence; and supposing he had certified the whole of the evidence for the prisoner, it would be no use to him afterwards upon his trial. It would result from this examination upon oath before Magistrates, that if the witnesses for the prosecution afterwards died or were unable to appear at the trial, their depositions would probably be used as evidence. That consequence, however, would not follow in the case of witnesses for the prisoner, whose evidence could not be received upon oath, and they must have been produced again in order to state the facts within their knowledge at the trial. If an attorney could not at that time have

1822.

Cox
v.
Colerdige.

claimed the right of being admitted to assist a prisoner during his examination, what authority is there for saying that the right has been since acquired? Certainly no statute law has given it, nor has any legal decision recognised it, incidentally. Had any such right ever been supposed to exist, it seems extraordinary that the attention of the legislature should never have been called to the subject, if it were thought necessary that his presence should be allowed. Several statutes have since passed respecting prisoners charged with offences before Magistrates, and such a right has never been in the remotest degree recognized. The statute 31 *Eliz.* c. 4, an act against the embezzling of armour, recognizes the right of a prisoner charged with an offence under that act, to make such lawful proof as he can by lawful witness or otherwise for his discharge and defence; but that clearly means the defence of the party upon his trial. Then follows the 4 *Jac.* 1. c. 1, which relates to the trial of felonies committed by *Englishmen* in *Scotland*. Both these statutes are commented upon by Lord *Coke*, in his 3d *Inst.* c. 22, p. 79; and though the latter statute speaks of witnesses to be examined on oath for the better clearing and justification of the party accused, this clearly means to refer to his trial before the Jury. Then the statute 1 *Anne*, stat. 2. c. 9, introduces a general provision for allowing the witnesses, on behalf of the prisoner, to give their evidence upon oath; but that statute speaks expressly of witnesses sworn upon the trial of the party. It seems, therefore, to be extraordinary that the attention of the legislature having been so often drawn to the situation and circumstances of a prisoner, under accusation before Justices of Peace, and so many commentators having remarked upon these statutes, not a word is to be found respecting the right which is now claimed by the plaintiff. If, therefore, it be correctly assumed that the examination of a prisoner before Justices of Peace is only an examination preparatory to trial, it then becomes a fit matter of inquiry as to what is the nature of the proceedings before

1822.

Cox
v.
Coleridge.

the Grand Jury, to which the examination before a Magistrate is exceedingly analogous. Is there any such examination as that contended for in this case, before the Grand Jury? Is the prisoner, then charged by indictment, allowed counsel or attorney to discuss the question of his guilt or innocence? Is he allowed to examine witnesses on his behalf to prove his innocence? Certainly not. The invariable practice from the earliest time is directly the contrary. In the absence, therefore, of any authorities upon the subject, it is a fair ground of reasoning from analogy to the proceedings before a Grand Jury, that no such right ever existed, or was conceived to be compatible with the due administration of justice. The case of the Grand Jury is precisely analogous to this, and in that none of these privileges are allowed. If this be so, upon principle, what is to distinguish the one case from the other, and what sufficient reason can be urged why the same privilege should not be allowed in both? It is a hardship, or not a hardship, that the prisoner, when under examination before a Justice, should not be allowed the assistance of an attorney. What is the magistrate to do? The law says, that the magistrate is to act at his own discretion, and he is not to discharge the prisoner except where the accusation is totally groundless.—[*Best*, J. And even where there was no ground for charging him, it was formerly doubted whether the Justice ought not to take bail.—*Bayley*, J. The prisoner, it may be said, has a right to cross examine the witnesses brought against him.—*Abbott*, C. J. But then perhaps he wants prompting.]—The magistrate holds an equal hand, and examines into the nature of the accusation brought against the prisoner, sifts it to the bottom, and endeavours to ascertain whether there is sufficient ground for a commitment. In this he acts upon a sound discretion, and according to the best of his judgment. He is to judge what is, and what is not a probable cause for commitment. The magistrate must be presumed to know

1822.
Cox
v.
Coleridge.

his duty, and even in a case where the charge is doubtful he will adopt the same course, and it will be for him afterwards to answer for his conduct if he acts improperly. The magistrate knows that he acts at his peril. Supposing it to be established, that the magistrate proceeds merely upon a primâ facie case, and that the fact of the commitment of the prisoner produces a prejudice against him on his trial, it will be for those who contend that they have a right to this privilege, to shew that some more substantial advantage will be gained on the other side. But this case must be argued on a still broader ground, in order to entitle the plaintiff on this record to judgment. He must contend not merely that the magistrates have a discretion whether they will or will not admit an attorney to act on behalf of a prisoner, under examination before them, but he must insist that they are *bound* to admit his presence, as matter of right, or else they subject themselves to an action. Now on which side would the convenience or inconvenience be felt by allowing this privilege? In what state would the police of this country be, if this were law? It is not necessary to assume that an attorney would appear before a magistrate for any improper purpose; but if an attorney is entitled to appear in the justice-room on behalf of a prisoner, the same privilege must be extended to all other persons who profess any skill in or knowledge of the law, and assume the right of assisting the prisoner in his defence. The magistrate cannot know who is or who is not an admitted sworn attorney. He must therefore be bound to throw the door of the justice-room open to every person who chooses to call himself an attorney, and he is not competent to judge of his claim to the title. Then it follows as a consequence, that the justice-room must be considered as a Court of Justice, open to all the public. What then would be the effect if the right were conceded to that extent? And yet the plaintiff must carry the argument to that extent, and must convince the Court that the right is

1822.



Cox
v.
Coleridge.

common to all persons before he can be entitled to judgment. In order to try the consequences which might result from such a privilege, let the case be put of a desperate gang of poachers, one of whom only is taken into custody, and brought before the magistrate, the ends of public justice might be totally defeated by allowing the presence of a stranger during the examination of the prisoner. The attorney or any other person who assumes that character, by being allowed to hear all the evidence, might be able to put it out of the power of the Justices to arrest the other offenders. Suppose another case, certainly of not frequent occurrence, but in the investigation of which the greatest secrecy might be required in order to attain the ends of public justice, namely, the case of high treason. One of the conspirators may be in custody, and it may be of the utmost importance that a secret examination of that person should take place; but this would be utterly defeated if the magistrates are bound to admit every person styling himself the legal adviser of the prisoner, and claiming to be admitted in that character. Where then is the hardship of denying this privilege? The only hardship is that which necessarily results from the imperfection of human laws; to which, under all circumstances, the subjects of the kingdom must make up their minds to submit. It must be assumed that in nine cases out of ten the prisoners brought before magistrates are justly suspected of the crime imputed to them—a suspicion arising either from their indiscretion, or their unequivocal acts, which admit of no doubt. It rarely happens that a perfectly innocent man is placed in such a situation. In all human probability he has been guilty of some indiscretion which subjects him to suspicion; but the magistrate, in the honest discharge of his duty, will investigate the case, and, if he sees no pretence for the accusation, he will discharge the prisoner, or he will commit him, taking upon himself all the responsibilities of the act. But is the prisoner the only person

1822.

Cox
v.
COLERIDGE.

who is to be considered in these cases; and is the magistrate, in the proper discharge of his duty, entitled to no protection? The magistracy of this country are surely entitled to some consideration. They come forward to do their duty in an arduous and responsible situation, unpaid and unpurchased; they gratuitously devote a great deal of their time to the service of the public; the criminal law of the country has become extremely intricate; and if they are to be perpetually exposed to captious actions for every mistake they make, the consequence will be to drive out of the commission of the peace those very persons whom it is most desirable for all parties should discharge the duties and office of a magistrate, namely, the country gentlemen, possessing character, fortune, and property in the kingdom. On these grounds it is safest to deny this as a matter of right, and leave it to the magistrates themselves to say in what cases they will permit the presence of an attorney, or other professional person, during their proceedings.

Denman, C. S., in support of the replication. By the law of the land a person, under accusation for a crime before Justices of the peace, has a right to have the assistance of an attorney to give him counsel and advice, with a view to his defence. [*Abbott*, C. J. Inform us what is an attorney. What part of the character and office of an attorney relates to the subject now under consideration? First define to us what is an attorney.] If this case is to be argued upon the precise legal definition of an attorney, then cadit quæstio. [*Abbott*, C. J. As applied to a Court of Justice, a person who has a right to appear for another, and to conduct his business in his absence, is what is properly called an attorney; but that is not so in criminal cases.] The argument for the plaintiff is, that the prisoner under accusation has a right to have the assistance of counsel or attorney during his examination. [*Abbott*, C. J. Then you must say that

the plaintiff attends as counsel or advocate. Being in fact an attorney of this Court makes no difference in the case. If the argument applies to him, it may apply to any other person who is skilled in the law, and is competent to give legal advice and assistance to the party accused. It is not the proper business of an attorney, in his character of attorney, to attend in criminal cases before a magistrate. Any other person equally competent to perform the same duty may have an equal right.] The case of an attorney and of counsel would stand on a different footing from that of other persons; the former is an officer of this Court, if he misbehaves himself, he is liable to the summary process, and is subject to the discretion of the Court; and therefore there is some security for his good behaviour, and the honest discharge of his duty. No such circumstances attend the situation of any other subject of the kingdom. When the question shall arise whether a person who is not an attorney, and who does not state himself to be a professional man, well skilled in the law of the land, may claim the right of assisting an illiterate person who may have the misfortune to labour under an unjust accusation, then it may be for the Court to inquire, upon what footing his rights are to be considered. But the case now under deliberation is that of a party who is an officer of the Court, who is admitted to be a person capable of giving that assistance which is required by the individual accused, his client, who, under such circumstances, might be exposed to the utmost oppression, upon the very principle which it has been found necessary to argue the case on the other side. All the impressions that have taken place upon this subject have resulted from the old authorities to which reference had been had, authorities against which any lawyer at the bar, at the present day, would feel ashamed to argue. The mere statement of them to the Court is sufficient to explode them for ever. The dictum in *Dalton's Justice*, upon which the whole of the argument on the other side was

1822.
Cox
v.
Coleridge.

founded, ought never again to be mentioned as an authority in a Court of Justice. In that work, p. 377, it is broadly stated, that the mere suspicion of felony, though it shall appear to the Justice that the prisoner is not guilty, binds him to commit the man for trial. Is such a doctrine as that to be endured at the present day for one moment in a Court of Justice? If it is, it must necessarily lead to the most enormous inconvenience and injustice. Such authorities may perhaps have given some colour of foundation for those impressions which have obtained with respect to the power of magistrates, but which no state of the common law of this country ever vested in a Justice of the peace. In the same book it is also laid down, that a person who makes a deposition, although he shall be infamous to the knowledge of the magistrate, and though he be not a fit witness to be heard in a Court of Justice, yet shall the Justice receive his information for the king, and bind him over to give evidence against the parties suspected; so that the party accused is not to have legal evidence against him, but the Justice is to receive such evidence for the king, as none of the king's courts would receive in support of an accusation against any of his subjects! No such principle of law is to be found in *England*, and until some more respectable authority is quoted for such a proposition, the mere denial of the existence of any such principle is sufficient. Such questions have very seldom been brought under the consideration of Courts of Justice, and almost every thing upon it rests on dicta and general impressions as to the power of magistrates expounded by such writers as *Dalton*. The opinion expressed by the Court in *Rex* v. *Eriswell* (a) is not unworthy of consideration; for in that case doctrines which are now universally exploded, as being utterly inconsistent with the first principles of justice, even in civil as well as criminal proceedings, were maintained by

(a) 3 T. R. 707.

two of the most learned Judges who ever set upon the Bench. This was the result of impressions not supported by any authority; and as those doctrines were over-ruled by *Rex* v. *Bilton with Harrowgate*(a) and *Rex* v. *Newnham Courtney*(b), so the doctrine quoted from *Dalton*, which places every man in the country at the mercy, not of the magistrate (for he is assumed by this argument to have no discretion), but at the mercy of any corrupt and infamous individual who might think proper to make a positive oath that a felony had been committed by him, must, when examined, share the same fate. The two cases which have been cited are *Rex* v. *The Justices of Staffordshire*, and *Rex* v. *Borron*. In each the application was for a criminal information, founded upon a suggestion that the magistrates were influenced by a corrupt motive. In *Rex* v. *The Justices of Staffordshire* the proceeding before the magistrate was upon a conviction under the Game Laws. When that case was before this Court two of its members were absent, the Lord Chief Justice and Mr. Justice *Holroyd*. The case was not decided upon any deliberate consideration, but one of the learned Judges did undoubtedly lay it down, that a party, upon a summary conviction before a magistrate for an offence which was to deprive him of his liberty, might be conducted without having an attorney on behalf of the defendant. It is submitted, however, in the first place, that such an expression of opinion was perfectly unnecessary in the decision of the question then immediately before the Court. That was a motion for a criminal information; and it is settled, that however erroneous or illegal the conduct of a magistrate may be, if there is no improper or corrupt motive imputed to him, the Court will never grant the rule. It was enough in the decision of that case for the Court to say, "here is no improper motive imputable to the magistrate, and therefore we will not grant

(a) 1 East, 13. (b) Idem. 373.

1822.
Cox
v.
Coleridge.

the application;" but surely the Court will pause, when a man is to suffer penalties upon a summary conviction upon the oath of a single witness, before they lay it down as a general principle, that the party, under such circumstances, has no right to the counsel and assistance of a legal adviser. It is hardly necessary to put instances in which such a principle might operate with the most oppressive hardship and injustice. For example, suppose a case under the late smuggling act, 57 *Geo.* 3. c. 87, which subjects the offender to a penalty of 100*l.*, and renders him liable to be confined in custody for five years in his Majesty's naval service, and this too upon the adjudication of a single magistrate, upon the oath of a single witness. Will the Court lay it down, that where a party is exposed to such perilous consequences, and where many important questions may possibly arise, he is to be so affected without the opportunity of being heard by some legal adviser, who may be at hand to render him his counsel and assistance? Surely the Court will pause and hesitate before they lay down such a doctrine on the authority of *Rex* v. *The Justices of Staffordshire*, where the suggestion of the Court was not necessary to the decision of that case. The learned Judge (*Bayley*, J.) is reported to have said, "that an attorney has no right to be present in the justice room during the examination; his presence would only produce confusion and irregularity in the proceedings of the magistrates." The same learned Judge said, "that perhaps counsel might have attended, though an attorney had no such right." To that it may be said, that such a privilege would, in many cases, be absolutely useless; for it might happen that counsel could not be procured. In such cases the parties offending are taken to the nearest Justice on the coasts of the kingdom, remote from such professional assistance. For instance, suppose a man charged with smuggling on the shores of *Lincolnshire*, where could he procure the aid of counsel to defend him from the penalties denounced by the act alluded to? As

to the case of *Rex* v. *Borron,* that is inapplicable to the present question. In that case the attorney claimed the right, not merely of calling witnesses to prove certain facts in support of a prosecution for felony, but to comment upon, and to apply the law to those facts; and he called upon the Justice to refuse him this privilege at his peril, thereby endeavouring to interfere with the duties which the law had imposed upon the Justice himself. Surely that case is perfectly distinguishable from the present. This is not a question relating to the party prosecuting, but to the party prosecuted, and the privilege now claimed under the circumstance of the particular case, is one which must be applicable to all cases of a similar nature. The right contended for in this case is, that every man under accusation before a Justice of the Peace is entitled to counsel to assist him in the cross examination of the witnesses who are brought against him, and of demonstrating to the magistrate by such means, that he ought not, in the exercise of a sound judgment, to commit an innocent man for trial, and thereby subject him perhaps to many months unjust imprisonment. It seems to have been assumed on the other side, that the magistrate has a right to exercise the power of examining the prisoner himself in secret. For this no authority can be cited. No magistrate has a right to take a prisoner into a room by himself, and there endeavour to extract from him any facts or circumstances which may tend to his conviction. Some unquestionable authority must be adduced to establish so extraordinary a proposition. As a measure of police, indeed, the magistrate would be justified in entering into a private examination of any person for the sake of tracing and finding a clue upon which afterwards the witnesses may be examined in a regular way, and their depositions taken down in writing; and if the depositions are to be taken in a regular way, they are to be taken in the presence of the prisoner. [*Abbott,* C. J. All previous inquiry must be extra judicial, and only necessary to enable

1822.



Cox v. Coleridge.

the magistrate to issue his warrant.] That is the distinction contended for. When the prisoner is brought before the magistrate, he has a right to see the witnesses whilst they are under examination, and of hearing their testimony delivered from their lips. After such examination he has a right to communicate all that has passed to his attorney, or other legal adviser, who may be retained for his defence, for the express purpose of meeting it by contradictory evidence. But it is also essential to justice, that he should be enabled to communicate with his legal adviser while the examination is going forward, and to avail himself of his assistance in the hour of peril and alarm, lest the agitation, which an innocent man may feel even under an unfounded charge, should betray him into imprudent expressions; and the danger of his fabricating a defence applies equally as an objection to his own undisputed privilege of being present and hearing the evidence against him. Another reason for this open inquiry into the circumstances of the case is, that no opportunity shall be afforded of bringing fabricated evidence hereafter against him in support of the charge when he is put upon his defence. The extra judicial examination which has brought the prisoner before the magistrate may be secret: but when he is there the proceedings become judicial. They are properly so described, because upon the decision of the magistrate depends the liberty, perhaps the life, and certainly the character and reputation of the prisoner. That the proceedings of the magistrates are judicial seems necessarily to result from the operation of the very statutes to which reference has been made in argument on the other side. The statute of *Philip* and *Mary* does not in itself make the depositions taken before the Magistrates evidence upon the trial; but from ancient times they have been admitted as evidence. The principle upon which they are admitted, is, that they are necessarily taken in the presence of the prisoner himself; he has the opportunity of hearing them, and the right of cross examining

the witnesses at the time they give their depositions. The words of the statute of *Philip* and *Mary* imply the presence of the prisoner, before the Justice, during the examination of the witnesses; for it enacts, "that when any prisoner is *brought before* him on a charge of felony, he shall take the examination of the prisoner, and the information of *those who bring him*, of the fact and circumstances thereof, and he is to put the same, or as much thereof as shall be material to prove the felony, into writing." This enactment is most certainly inconsistent with a secret examination. The prisoner is not to be induced to confess his crime, nor to be sifted of facts which may afterwards become evidence against him. He is present for the express purpose of cross-examination,—a real and effective cross-examination, such as a skilful adviser may conduct or suggest; not such an ignorant course of proceeding as may ensnare and tend to convict him. All that the statute requires is, that the magistrate shall take in writing the fact and circumstances of the case, or as much thereof as shall be material to prove the felony; that is, to prove the circumstances of the case, and to prove that there is enough to found the warrant of commitment; but he is not arbitrarily to follow the directions of *Dalton*, and to commit the party for trial, though he is perfectly satisfied of his innocence. The passage which has been cited from *Hawkins P. C.* c. 15. s. 1. assumes this right in the Magistrate, of exercising his own judgment upon the case; for he says, "wherever a person is brought before a Justice of Peace upon an accusation of treason or felony, he must be either bailed or committed, unless it manifestly appear that no such crime was committed, or that the cause for which alone the party was suspected was totally groundless." Putting the present case upon that proposition, it must become a question before the Justice, whether the charge does or does not amount to a felony. It may then become competent for the prisoner to shew that there is no just ground in

1822.
Cox
v.
Coleridge.

point of law for the charge of felony, and that there is no cause of suspecting him of such a crime; but how is a poor ignorant man, who is perhaps subjected to the malicious charge of an enemy, to be able to avail himself of that advantage, unless he has the aid of a legal adviser, capable of assisting him in discussing the question before the Justice? Surely in such a case he is entitled to the assistance of a person skilled in the law. [*Bayley*, J. Or else you must have a magistrate who knows his duty, and can discriminate what is and what is not felony.] A magistrate, in the honest discharge of his duty, may make a very gross mistake in point of law. His duty does not require him to decide finally upon the guilt or innocence of the party, but he is to be satisfied upon the evidence in point of law, that a felony has been committed. For this purpose, he may require witnesses to be examined for the prisoner as well as for the prosecution, in order to satisfy his mind that the facts amount to a felony. In this very case that was the object of the magistrates, for they discharged the prisoner for the purpose of allowing him an opportunity of bringing his witnesses on a day specified, in order to shew that no felony had been committed by him; and then it was that the plaintiff on this record, attended for the purpose of laying the evidence of those witnesses before the magistrates. It is not necessary in the present case to contend, that the plaintiff would have been at liberty to make any statement by way of argument before the magistrates, or even to examine the witnesses, but it is contended, that he is at liberty to suggest to the party under accusation what may be fit or proper to be done in order to induce the magistrates to order his discharge. With respect to the distinction between an attorney and a counsellor, there is a case in *Skinner*, in which the distinction is denied. In that case there was a covenant for executing such conveyances and assurances as the counsel should advise and require. An attorney only was consulted, and the Court held, that

1822.



Cox
v.
Coleridge.

sufficient to satisfy the words of the covenant. There is no magic in the word "*counsel*." The attorney is the only counsel that can be procured in remote parts of the country. In *London*, undoubtedly, counsel may be obtained at any time, because they are on the spot in attendance upon the Courts of the metropolis, without any of the inconveniences apprehended, but that is not so in the country, and, therefore, a prisoner in such a situation, is obliged to procure the best counsel he can, namely, an attorney, who, from his knowledge of, and experience in the law, may be of service to him during his examination. In the case alluded to, the Court drew a distinction between an attorney and other persons not in the profession, for they said, that if it had been a physician, or a clergyman, that would not do, but an attorney has law enough in him to give counsel if the party chooses to abide by it. The defence of prisoners at all the Quarter Sessions throughout the country was, within these few years, exclusively confided to attornies; it is still so in many places. These examinations which take place before magistrates are actual evidence against the prisoner on his trial, in case of the death of the witnesses, or their inability to travel to the Assizes. Is it to be said then, that a prisoner is to be affected, perhaps in his life, by the depositions given against him before a magistrate, unless he has the opportunity of cross examining the witnesses with the aid of legal advice, when they give their depositions, those depositions being afterwards receivable as evidence against him in the cases mentioned? In a case which recently occurred at *Leicester*, where two individuals were charged with a murder, and the alleged guilt of the prisoners, depending very much upon the deposition of the deceased, the learned Judge was of opinion that as the magistrates' clerk did not take the deposition with perfect accuracy, it was not receivable in evidence. [*Best*, J. I would not receive the examination in evidence, because it was not taken in the words of the witness.] That recognizes the

1822.

Cox
v.
Coleridge.

distinction which is to be drawn in these cases, namely, that the examination cannot be taken unless in the presence of the prisoner, in order that he may hear what is said, and have an opportunity of cross examining the witness. [*Best*, J. In the case you allude to, it was the declaration of a dying man.] But the principle would be just the same. It has been doubted by a very learned Judge (*Chambre*, J.) whether the mere reading over the depositions which have been taken, to a prisoner when they were not taken in his presence, would be sufficient. That doubt, however, has been removed by the decision of a leading case, and it has been held, that the reading over the depositions to the prisoner is equivalent to an examination in his presence. [*Bayley*, J. The witnesses being present at the time, so that if the prisoner wished to put any question upon the examinations, he might have an opportunity of cross-examination.] But suppose the prisoner charged, has not the human voice,—is "deaf and dumb, or suppose the case of a foreigner, who is utterly ignorant of the *English* language, or suppose, as in this very case (for the demurrer has admitted it), this man is so ignorant and illiterate, as to be unable to protect himself from the consequences of the accusation, and cannot avail himself of the opportunity of cross-examination, of what advantage would the privilege be to him without legal advice? [*Bayley*, J. He may suggest any question he may think proper to the magistrate, who will put it for him.] It is to guard the prisoner against the consequences of his own ignorance, that legal advice in such a situation becomes necessary. When he is attended by an attorney, the latter receives his confidential communications as to the real state of the facts, and the attorney deals with those facts according to the principles of law; and if in his judgment and experience, he thinks the prisoner ought to remain silent, and reserve his defence until the day of trial, he will so advise him. [*Bayley*, J. I have no doubt that a prisoner against

1822.

Cox
v.
Coleridge.

whom a charge is brought, may suggest to the magistrate any question in the cross-examination of the witnesses, which he thinks will be of benefit to him.] Such a privilege, perhaps, might operate in the case of an ignorant and illiterate man, to his prejudice. The argument urged to the Court is, that the prisoner is entitled to have his attorney in attendance upon him, in order that he may have the benefit of his counsel and advice as to the course proper to pursue. An illiterate man, unprotected by legal assistance, may imprudently suggest a question to the magistrate, which may turn the balance against him, and the prejudice resulting from his indiscretion, may strongly operate to his disadvantage when he comes to the trial. In the very beginning of a prosecution against a prisoner, there seems no good reason why he should not have the same protection which the law allows him on his trial. In a Court of Justice, the prisoner has an undoubted right to have the assistance of counsel and attorney in conducting his defence. The utmost skill and ingenuity may be necessary to demonstrate innocence, and rebut a false charge; and if he be an innocent man, he ought, in limine, to have the same sort of assistance, in order to avert that unmerited punishment to which, perhaps, the injudicious and erroneous commitment of the magistrate may subject him. It has been assumed, that the case of the Coroner is distinguishable from that of the magistrate, but that is not so. The duties of each are in principle the same. The duty of the Coroner is to enquire whether *A. B.* or *C.* or any body, has been guilty of a particular offence against a particular individual. On such an inquisition there seems to be no doubt that counsel might attend on behalf of the party likely to be affected by the proceedings. The Coroner's is an inquest of office, and if counsel may attend before the inquisition, there is no good reason why the same privilege should not be extended to a case before magistrates. [*Bayley*, J. The Coroners' Inquest is in the nature of a Grand Jury; it is impanneled for the specific purpose of ascertaining the particular cause of

1822.

Cox
v.
Coleridge.

the death of the deceased, and this is to be done on view of the body. *Best*, J. The Coroners' Inquest makes a presentment upon which the Justices of gaol delivery will afterwards act judicially. The inquisition is equivalent to the finding of a Grand Jury.] In the case where the deceased is supposed to be felo de se, there can be no doubt that the representatives of the deceased may attend by counsel, in order to avert the consequences of such a finding by the inquest. If counsel then have a right to attend before the Coroner on behalf of persons remotely interested, à fortiori he has a right to attend before the magistrates for the protection of the party brought into jeopardy by the accusation.

Adolphus, amicus curiæ, referred to *Barclee's* case (*a*), as an authority to shew, that the Coroner is to hear the evidence on both sides on an inquisition *super visum corporis*. He mentioned, that on a recent occasion (*b*) he had looked into the authorities, as to the right of counsel to attend before a Coroner's inquest, and that he had in fact himself attended several successive days as Counsel upon the inquisition alluded to.

Denman, C. S.—In order to support the argument on the other side, it was found necessary to resort to old dicta of doubtful authority in order to support an argument, which is in opposition to every sound principle of justice, good sense, and humanity. In no book of authority can any thing be found which militates against the privilege now claimed. It has been the general practice on almost all occasions, at least tacitly, to acquiesce in the right of a counsel or attorney to attend the examination of a prisoner before magistrates. Before the Coroner, the right undoubtedly exists, and it would be contrary to the spirit of

(*a*) 2 Sid. 90.

(*b*) Inquest upon the body of a person named *Honey*, who lost his life on the occasion of *Queen Caroline*'s funeral in 1821.

justice if it were denied. Amongst other duties of the Coroner's Inquest, they are to find whether the party supposed to have caused the death of the deceased, has or has not fled; and that question is always put to the jury, and if the Coroner did not do so, he would be finable. Upon an issue of that kind, therefore, there can be no doubt that counsel would have a right to attend on behalf of the party. [*Bayley*, J. This distinction is to be taken in the case of the Coroner's inquisition; if the inquest is traversable, then there appears to be no right to have counsel, but if it is conclusive, the party has a right, before he is concluded, to have his counsel attending on his behalf.] Then the same principle would apply to proceedings before Justices, under penal statutes, which are conclusive, where no appeal to the Sessions is given; but in the case of *Rex* v. *The Justices of Staffordshire*, it was distinctly laid down, that even in proceedings under penal statutes, an attorney has no right to be present in the justice room. [*Bayley*, J. That case is not to be considered as the solemn decision of the Court. The opinion there expressed, upon this point, was merely the obiter dictum of a single Judge, to which I pay no respect. *Abbott*, C. J. An observation thrown out by a Judge merely in the course of argument, is not to be considered as conclusive of the case, and ought not to be urged as a solemn decision.] But it is on that dictum that the defendants argument depends. [*Best*, J. When a man is put upon his trial, the practice is first to inquire whether the prisoner be guilty or not guilty, and then if he be found guilty, to inquire whether he had fled. *Abbott*, C. J. That was always done upon the first arraignment before the Jury. The clerk of arraigns first charged the Jury to inquire whether the prisoner was guilty or not guilty; and second, whether he had fled. *Bayley*, J. That was the invariable practice on the Western Circuit, and used to be such on the Midland Circuit.] The nature of the proceedings in this particular

1822.

Cox
v.
Coleridge.

case shews, that there was to be an hearing judicially before the magistrates. They were to decide whether or not the case amounted to a felony, and for that purpose they required witnesses to be examined on both sides. It is said to have been doubtful, whether, before the statute of *Anne*, c. 9, any witness for the prisoner, even upon his trial, could be examined, though Lord *Coke* (*a*) did not entertain any. In consequence however of early impressions, an act of parliament was deemed necessary, to enable the prisoner to have witnesses sworn in his behalf, even in a case of life and death. In this particular case the party is brought before the Justices on a charge of felony, and the magistrates themselves appoint a day on which he is to appear with his witnesses to prove his innocence. The time is prefixed for that purpose; and the question is, whether the witnesses are to attend under circumstances which might make their examination completely unavailing. [*Abbott*, C. J. In this case it does not appear from the pleadings, that the plaintiff was to be present for the purpose of cross examining the witnesses for the prosecution, but to conduct the examination of the prisoner's witnesses.] He was to do both; for the plaintiff's replication says, "that he was retained by the prisoner to assist him with his counsel, skill, suggestions, and advice, in making his the said *George Brown*'s defence before the said defendants as such Justices." This imports that the plaintiff was not merely to assist in cross examining the prosecutor's witnesses, but also in examining such witnesses as would prove the prisoner's entire innocence. It does not appear that the prosecutor was to attend. [*Abbott*, C. J. There might have been some examination of the prosecutor's witnesses before the warrant was granted. *Bayley*, J. What power has the magistrate to examine the prisoner's witnesses on oath?] There seems to be no doubt that he has such a power. [*Bayley*, J. If he had such a power before the statute of *Anne*, then there would be this anomaly—the magis-

(*a*) 3 Inst 79.

trate might examine the witnesses for the prisoner on oath, but when the prisoner came to take his trial, they could not be examined on oath. There is no provision in the statute of *Anne* which says any thing as to the examination of the prisoner's witnesses on oath before the magistrates. By sec. 3. of that statute it is enacted, "that from and after the 12th *February*, 1702, all and every person or persons who shall be produced or appear as a witness or witnesses, on the behalf of the prisoner, upon any trial for treason or felony, before he or she be admitted to depose or give any manner of evidence, shall first take an oath to depose to the truth, the whole truth, and nothing but the truth, in such manner as the witnesses for the queen are obliged to do." This statute clearly refers only to the witnesses called for the prisoner on his trial.—*Abbott*, C. J. I think it will be found that the prosecutor and his witnesses only are to be examined on oath, and they are the persons who are bound over to give evidence at the trial. In the defendant's plea nothing is said about the adjournment of the examination to a future day, in order to give the prisoner an opportunity of producing his witnesses. The plea alleges, "that the Justices were assembled for the purpose of taking the information upon oath, touching and concerning a certain felony, with which the said *George Brown* was charged, and then in custody." According to this, they were merely to examine the witnesses which should be produced touching the charge, and therefore it is assuming something to say, that the witnesses, who were to be afterwards called, were essential to the prisoner's defence.] On the other side certain statutes have been adverted to, with a view of shewing that the defendants were justified in their conduct towards the plaintiff; but those statutes (1 *Rich.* 3. c. 3. and 1 & 2 *Phil.* & *M.* c. 13.) evidently shew that the examination of the prisoner must be public. Supposing then the magistrate chooses to institute a private examination, and say, "I, in

1822.

Cox
v.
Colfridge.

the exercise of my authority, choose this should be a private examination, and I won't permit you, the attorney, to attend," could the attorney be treated as a trespasser in going into the Justice's room in the exercise of that right, which primâ facie belongs to all parties? At all events, if this right of private examination exists, would not the plaintiff have been entitled to notice from the Justices that they were conducting a private examination? Here there was no notice of that kind given or stated, and therefore the forcible ejection of the plaintiff could not be justified. If it should be said, as sometimes it has been, that such persons have no right to obtrude into the Justice's parlour, to that it is answered, that the Justices are not bound to examine the prisoner in their own private parlour, but are required to transact the business of their office in the public justice room. [*Abbott*, C. J. It is very often convenient that the examination of the prisoner should be private, and such a mode of proceeding is frequently beneficial to the prisoner himself; for if he be an innocent man, he is not subjected to public exposure; and if upon such examination the magistrate finds there is no foundation for the charge, he is immediately liberated, without any taint on his character.] If in this case the plaintiff had had notice that the examination was to be private, then he would take the peril of the intrusion upon himself; but as no such notice was given, he merely exercises his right as an attorney, of entering the justice room, which is primâ facie an open Court. [*Abbott*, C. J. The law would be the same, whether the Justice sat in a private room, or in his public office. If the right claimed by the plaintiff is lawful, it is an universal right.] There is a second point raised upon these pleadings, namely, supposing the plaintiff had a right to be present to give his legal assistance to the prisoner, still, whether such a right would justify him in breaking and entering the justice room to assert the right of a third person. It is difficult to conceive

1822.

Cox
v.
COLERIDGE.

how this can be said to be the right of a third person, and not of the attorney himself. Unless it is his own right, which he enjoys in common with the rest of the public, he could not assert it as the right of a third person. This right is claimed on a much broader ground, and it must be claimed at once as a public right. [*Bayley*, J. That would make the magistrate's room a public Court of Justice, and consequently all persons would have a right to enter.] The proceedings in this particular case were not secret. There were a great number of poor persons present who had nothing to do with the proceedings immediately before the Justices, and the plaintiff being the only attorney in the room, he is selected for this forcible expulsion. He, therefore, had no other course to adopt but to endeavour to assert his right, or acquiesce in the assumed authority of the Justices. [*Abbott*, C. J. If you put the case upon the ground that other persons were there, you must shew that they were there lawfully.] If an attorney is retained to attend the examination of a prisoner on a charge of murder, for example, he is to make his way into the justice room in the best way he can, and exercise his right with as much firmness as is necessary. It is his bounden duty to take care and attend to the instructions of his client; and even upon the ground of the jus tertii he would be justified in so acting. That is precisely the present case; the plaintiff is retained on behalf of a prisoner to attend his examination. Acting upon that retainer, he peaceably, but firmly, asserts that right. He does not commit a trespass in the first instance, but the trespass is committed upon him in the assertion of his right to be present at the examination. It is not necessary in the present case to contend, that the magistrates are bound to admit every body; but in answer to this action they must shew that they have a right, not merely to exclude the plaintiff, but every body else. These are the topics upon which the plaintiff rests his case. It is submitted, under the stat. 1 & 2 *Phil. & M.*, and con-

1822.

Cox
v.
Coleridge.

sidering the practice which has uniformly prevailed under that statute, and, consistently with the first principles of justice, that an attorney has a right to be present at the examination of a prisoner charged with felony, and that this right belongs to him in his professional character, whatever may be the case, where the party claiming the right is an ignorant, illiterate, and incompetent person.

Coleridge, in reply, was stopped by the Court.

Abbott, C. J.—If I thought our decision in favor of the present defendants would be productive of any inconvenience in the general administration of justice, or would in general tend to the abridgment of the liberty of the subject, which may be considered as the greatest of all inconveniences in the administration of justice, I should pause before I pronounced my judgment. Being perfectly convinced that such a decision can have no such effect, and thinking, on the contrary, that considering the matter in an enlarged view, it is more beneficial to the subject, that these examinations should be conducted without the presence of attornies than with them, I do not see any reason why I should postpone for any time, the delivering of that opinion which I have formed. The plaintiff cannot succeed in this action unless he can establish, that every person who is brought before the magistrates, charged with felony or other crime, (and I cannot distinguish between one and the other) has a right upon such examination to have the presence and assistance of some person who, by his profession and education, may be skilled in the law. An attorney certainly has no right to give his attendance on such an occasion, inasmuch as it is not the proper duty of an attorney, as such, so to act; for it is merely in the absence of the party that he is to appear, and not when the party is himself personally present. If he is to appear on the behalf of the party in his presence, then he attends as his counsel and advocate.

1822.

Cox
v.
Coleridge.

Now if there be any such right, one should have expected to find it recognized in some book of authority; but undoubtedly there is no book in which it is in any way recognized. In practice, Justices do on many occasions permit the presence of persons learned in the law. They do so very often, and there are cases in which it may be convenient for them so to do. Where doubts and difficulties present themselves, or are likely to present themselves in the course of an examination of a prisoner, it may be fitting that they should have the benefit of the assistance of other persons skilled in the law; though, we must assume, that the Justices themselves are by no means ignorant of the law or unqualified to discharge their duty; and whenever those cases do occur, I believe it is found that the magistrates are not only willing to have such assistance, but are often desirous of the presence of professional men. It by no means follows, however, as a consequence, that the admission of this class of persons to be present on some occasions would confer a right to be present on all; and the case on the part of the plaintiff cannot be sustained without shewing that they have a right to be present on all. Indeed it is impossible to distinguish between the case of one, and several persons, because if one has a right to be present at the examination of a prisoner, many may insist upon the same right. I cannot distinguish between the case of this particular individual, and that of any other person. If the attorney has a right to be present, he may obtain such information as may tend to frustrate the administration of justice, by knowing who the persons are who are likely to be accused; for if but one only of several persons implicated in the crime happens to be in custody, by this means the others may be got out of the way, and escape detection. There would therefore be great inconvenience in establishing such a right on all hands, and on all occasions. But if there be a right in the party accused to have the presence of some legal person on his behalf,

1822.
Cox
v.
Coleridge.

it seems to me to be impossible to say, that the party who prefers the prosecution has not an equal right to have the presence and assistance of some legal person on his behalf. The consequence of having persons on each side, of that description, would, in many cases, lead to great inconvenience, and certainly to great expence. That alone is a reason why it should not be allowed; but, in many cases, it would be highly prejudicial to the prisoner under examination, because it is much more likely that the prosecutor should be able to have the presence of legal advisers, than the party who is accused. That is more likely to happen in the one case than in the other. On the other hand, if the privilege is to be confined to the prisoner, which, it is supposed, would have an influence with the magistrate in his favour, it seems to me that the magistrate would be as likely to commit, or be as ready to discharge the party, as he would in any case where he was allowed to exercise his own judgment and discretion. The same consequences therefore, would be just as likely to follow in the one case, as in the other. What is the nature of the inquiry at which, the plaintiff now insists upon his right to be present? It is not a trial; the magistrates are not assembled in any thing, which can be properly called a Court. The proceedings on the part of the magistrates are merely preliminary, in order to ascertain whether there is sufficient ground to commit the party for trial by the country. Before the Grand Jury also the proceedings are preliminary. If the party accused has a right to have the assistance of some person on his behalf at the first preliminary inquiry, it would be exceedingly unjust to say, that he has not an equal right to have the like assistance on the second; and I find it very difficult to distinguish between the one and the other, in the consideration of this question. Being only a preliminary investigation of the case in both instances, it seems to me, that they are both to be governed by the same rule. This is the case of a man who, in his examination before Justices, desires to

1822.

Cox
v.
COLERIDGE.

have the presence of some person who is not allowed to examine the witnesses with his own lips, but who shall be able to instruct the prisoner how to do so, and to give him advice and assistance in the course he is to adopt. That is a very different thing from having the presence of such a person on the trial of the party accused. It seems to me, that the acknowledgment of such a right (and in the very first instance this is claimed as a right) would, in many cases, occasion the greatest possible inconvenience; the inconveniences even, with respect to personal liberty, would be greater than those which now exist. I think it is much better and safer to leave it to the discretion of the Justices, whether, upon occasions like the present, a legal adviser, on behalf of the party accused, shall enter their room, to hear their proceedings, and give such assistance as he can to his client during the investigation of the case. It is much better to leave it to the discretion of the Justices than to say that he shall, in all cases, be bound to admit every person who introduces himself as the legal adviser of the prisoner. I think there is no authority in favour of the right now claimed. The plaintiff rests his case upon the trial of a right, and thinking that this will be the establishing of the right in all cases, I am of opinion we ought not to do that which must be productive of so many inconveniences.

BAYLEY, J.—I am of the same opinion. This is not a question upon a summary conviction, and not any question where the decision of the magistrates will be conclusive against the party; and whenever a question of that kind shall arise, I hope I shall not be bound conclusively by any obiter dictum which may have fallen from me in *Rex* v. *The Justices of Staffordshire*. Whenever that point shall be distinctly raised, my mind will be open upon it, and I shall be ready to hear it discussed on the one side and the other, and give my opinion upon deliberate consideration. This is not a

1822.

Cox
v.
Colleridge.

question whether the magistrates are to exercise a discretion, whether an attorney shall or shall not be admitted into their room. The question here is, whether the person against whom the charge is made, has a right to insist that he shall have a person present in order to give him legal advice and assistance. I do not found my opinion upon any distinction between attorney and counsel, but I form it upon the principle that upon the examination before the magistrates on a charge of felony, the party accused has no right to insist upon having the presence of a legal adviser as a matter of right. My opinion is, that neither the prisoner on the one hand, nor the prosecutor by whom the charge is made, on the other, has any right to have a legal adviser present; and in giving this opinion, I have had in view the provisions of the statute 1 & 2 *P. & M.* c. 13. s. 4. That statute points out in explicit terms the duties which the magistrates are called upon to discharge. They are "to take the examination of the prisoner, and the information of those persons who bring him before them, on the charge of felony; and the fact and circumstances thereof, or as much thereof as shall be material to prove the felony, shall be put in writing." I am by no means satisfied with those authorities which have been relied upon by the counsel for the defendants. I differ from those authorities which say that the magistrate has no discretion, and that he is not to judge of the probability of the case, and of the credit of the witnesses who are brought before him to support a charge of felony. I think the magistrate has a right to exercise his own discretion in such cases, and that he is bound to do it, and he ought not, as it seems to me, to commit the party, unless he thinks there is a primâ facie case made out by witnesses whom he may think entitled to a reasonable degree of credit. But when that is the case, it is his duty to commit. The magistrate is generally a man of good education, and who, to a certain degree, possesses legal notions, and he is bound to act impartially between the prosecutor on the one hand, and the

prisoner charged on the other. If the person charged, is really innocent, he would be competent, however ignorant, to suggest to the magistrate such topics as he thought would be of advantage to him, in order that the magistrate might sift the story to the bottom; and the magistrate standing indifferent between the one side and the other, is the only legal adviser which the party has a right to insist shall be present at the time of the inquiry. There are many instances in which, in the exercise of a just discretion, the magistrate would give to the party the privilege of having a professional person present on his behalf; but still I should say that that was a privilege only, and not a right, and that the magistrate is to exercise his own discretion upon the subject. No person has a right to say, against the will of the magistrate, "I shall force myself upon you; for I have a right to conduct the case, on the part of the prisoner, against whom the charge is made." I think there is, to a certain degree, an analogy between the inquiry before the magistrate, and that before the Grand Jury. The Grand Jury hears a case ex parte, and ex parte only, and though it may be said to be extremely hard, that a person should be deprived of his liberty merely upon an inquiry before magistrates, where he alone is present to examine the witnesses brought forward against him, and where he has not the advantage of legal assistance, yet the case, when it is brought before the Grand Jury, is, with respect to him, still harder, because there the evidence is given in his absence; he can have no witness or person attending on his behalf to avert the finding of the bill of indictment by the Grand Jury, which is to be the foundation of his subsequent trial. There he is absolutely defenceless, and has no opportunity whatever of being heard by counsel or attorney. There is no authority which says that the party against whom the charge is made has the right which is now claimed. I believe this is the first instance in which the right was ever claimed, and when we look back to the statute of *Phil. & M.*, under

1822.

Cox
v.
Coleridge.

which the magistrate now acts, and considering how the law stood at that period of time, at least as far as respects the witnesses adduced on the part of the prisoner, it cannot be supposed, that at that period the party had a right to have an attorney present attending on his behalf to examine the witnesses. But it may be considered, that that is not a fair mode of putting the question, because at that time, however beneficial it might have been to the party to have some person present to cross examine the witnesses for the prosecution, and adduce evidence on his own behalf, still the right did not then exist. Therefore I shall not found my opinion upon the circumstance, that at the period when the statute of *Phil. & M.* passed, the party had no right to have witnesses examined on his behalf. I put the case on the broad ground, that it is entirely in the discretion of the magistrates whether they will or will not admit any person besides the witnesses for the prosecution and the person charged, and it being matter of discretion in him, the person against whom the charge is made is not entitled to claim as matter of right, to have an attorney present.

Holroyd, J.—I am of the same opinion. I think the right claimed in the present case, namely, for an attorney of this Court to act upon the retainer of a person charged with felony before magistrates—not only to give his advice to the party charged, but to examine the witnesses adduced on his behalf, and also to cross examine the witnesses for the prosecution, cannot be legally supported. I mean, it cannot be supported as a matter of abstract positive right. The magistrate, in the discharge of his office, appears to me not to be acting as a Judge in a Court of Justice. His authority is to inquire, and he is necessarily invested by law with power for that purpose, and the law presumes primâ facie that the magistrate, who is appointed, is properly qualified for the administration of the law. It is to be presumed primâ facie that the magistrates will do their

1822.

Cox
v.
Coleridge.

duty faithfully and honestly, and if they do not, they are punishable. The law intrusts the magistrates with and confers upon them, the power of investigating and of inquiring whether there be sufficient ground to commit the party accused, so that there shall be further inquiry into the charge made against him. The law gives the power to him to do that, and not to any other person, whom the prisoner charged, thinks fit to bring with him for the purpose of examining the witnesses. I apprehend the claim which is at present made, goes to the extent that the prisoner who is charged, might have any person whom he supposed skilled in the law to act for him; because, though the person claiming on this record, is claiming as an attorney of this Court, yet the proper province of an attorney does not go to the examination of witnesses, nor to an interference in the investigation of the charge itself. The province of an attorney, is no more than to be put in the place of the principal; that is, to act for him in the suit in which his principal is engaged. By the common law the party was not entitled to appear by attorney, unless his personal attendance was dispensed with under the special circumstances of the case, and then it was by writ out of Chancery. Formerly attornies were never admitted to appear for the party himself in the first instance, and whenever the defendant or the plaintiff could appear in person, he was not at liberty to appear to or bring an action by attorney. Lord *Coke* (a) lays this down broadly, and he mentions a case where an appeal of mayhem was brought, in which the plaintiff appeared by attorney, and declared against the defendant, "who prayed that the plaintiff might be remanded, for that he could not appear by attorney, and if the plaintiff appeared not, that he might be nonsuited; against which the counsel of the plaintiff objected, that the plaintiff in appeal of mayhem might appear by attorney, for that it might be, that he was so wounded as he could not appear, and for authority cited 21 *Hen.* 7.; to which answer was made by

(a) 2 Inst. c. 8. p. 313.

1822.

Cox
v.
Coleridge.

the counsel for the defendant, and resolved by the whole Court, that the plaintiff could not appear by attorney; for the defendant may demand oyer of the maim, &c. which shall be peremptory to him, being a trial of the mayhem, which is a trial which the law giveth him." I mention this merely for the purpose of shewing, that the fact of the plaintiff being an attorney, considered with reference to the province and duties of an attorney, makes no difference in this case, so as to narrow the claim of the party, if he be entitled to have any person present assisting him in his examination. The business of the attorney is only to appear for a party, and act for him in his absence, and he is put exactly in the place of his client; but that is not so upon an inquiry where the principal is necessarily present, and in such a case the attorney has no right to interfere in the administration of justice; which in that case is committed to the magistrate only. It is no more his duty as an attorney to do that, than it is the duty of any other who may be supposed to be skilled in the law. Neither is there any authority to be found in the law, nor is it agreeable to the practice, as received or understood, that persons who are charged with a crime have a right to legal advice and assistance, when the duty is thrown upon the magistrate of inquiring whether there is sufficient in the case, on the oath of the witnesses, to justify him in saying that there shall be a further inquiry into the charge. This is the duty of the magistrates, and no one attending on behalf of the prisoner, has a right to interfere with that duty. It is very convenient and very advisable on many occasions when doubts arise, that the magistrate should have the assistance of a person skilled in the law, to give him information, if it is required, and whenever such occasions arise, the magistrate, in the anxious discharge of his duty, will require such assistance in the first instance, lest any mistake should be made disadvantageous to the party accused. But that does not go to establish that the party has a right to have any person brought forward to assist the magistrate in the execution of his duty.

It is entirely a matter in the magistrate's discretion; for when a sufficient ground is established upon evidence to justify the commitment, the magistrate sends the matter for further inquiry. I think the prisoner who is charged has no ground as a matter of right to insist that any person shall attend on his behalf during the inquiry.

Best, J.—I also am of the same opinion. In this particular case the party is brought before the Justices on a charge of felony, and the Justices very properly institute an inquiry whether there are sufficient grounds to commit him for trial. It is asked, in this case, whether the party is not at least entitled to counsel and advice during his examination? I should be sorry to pronounce that in no case should the party have the benefit of counsel; but it is much better that there should be some hardship suffered in the individual case, than that the public should sustain great detriment by the recognition of this as a general right; for I have no doubt that if the right here contended for is conceded, the public will sustain considerable prejudice. It is not left to the discretion of the magistrates whether they will or will not admit the attorney into their room. The plaintiff says he has a right to be present at the examination of the prisoner. He has no such right by any law with which I am acquainted, nor can he be present at any private examination; for if the attorney has a right to be present, there will be an end to the utility of such examinations. It must occur to every body at all acquainted with the administration of justice, that private examinations are often necessary to the ends of justice. Suppose the case which has been just put by the defendant's counsel in argument, where one of a gang of poachers is taken up; if the attorney is to be present at the examination of that individual, he may convey such information to the other parties as will prevent their apprehension. Again, suppose the case of stolen goods, which are concealed, may not the attorney, if he is allowed

1822.

Cox
v.
Coleridge.

to be present at the examination, communicate information by which those goods may be removed, and thereby destroy the evidence which the finding of them in the place of concealment, would afford, in order to make out the case against the prisoner? It is said by the plaintiff's counsel, that as the prisoner himself must be present at the examination, he might make his communication afterwards to his attorney, and thereby effect the same object as well as if the attorney himself were present. But the magistrate, if he thinks proper, may take care that no such communication shall take place; he may cut off any intercourse with the prisoner which is likely to interrupt the investigation of truth and prevent the detection of crime. I think that arguments of convenience or inconvenience, have little to do with the present question. We must decide according to the law as we find it. If the law, as it stands, is productive of inconvenience, it is not for us to correct it; it is for the legislature to give us a new rule; we are only to inquire what the law is at present. It is insisted that the inquiry before the Justices is a judicial inquiry. If it is, undoubtedly it is open to all parties, and all persons have a right to be present, and if properly authorized may do what they think proper in order to assist the magistrates in forming their judgment. But there is no authority whatever upon which it is possible to argue that this is a judicial inquiry. It is nothing like a judicial inquiry, and it will not be found upon an examination of the law, that the magistrate is finally to decide upon the guilt or innocence of the party accused; but that he is merely to ascertain whether there is sufficient ground to deprive him of his liberty; whether he is to be committed for trial or discharged altogether. With the passage referred to in *Dalton's Justice* I do not agree, and I am warranted in saying, that that cannot be law by the observation quoted from 2 *Hawkins' P. C.* c. 15. p. 140.; because, according to that passage, the magistrate has a right and ought to discharge the prisoner, if it manifestly appears that no crime was com-

1822.
Cox
v.
Coleridge.

mitted, or that the cause for which alone the party was suspected was totally groundless. But in order to ascertain whether there is any ground for the charge, the Justices must enter into an examination of the witnesses on both sides. The meaning of that is this; if he finds that the evidence, on the part of the prosecution, establishes nothing like a primâ facie case, then it is his duty to discharge the prisoner. That book supplies us with very little information as to what was the practice in the examination by Justices before the statute of 1 & 2 *P. & M.* The only passage that I can find upon this subject is in *Dalton*, c. 165. p. 381, and I think this must be taken to be the law. He says, "it seemeth just and right that the Justices of Peace, who take information against a felon or person suspected of felony should take and certify, as well such information, proof, and evidence, as goeth to the acquittal or clearing of the prisoner, as such as makes against the prisoner; for such information, evidence, or proof taken, and the certifying thereof, by the Justice of Peace, is only to inform the King, and his Justices of gaol delivery, of the truth of the matter." It is not to be taken therefore, that he is to decide upon the matter judicially, but he is to take the informations whether they go to the acquittal or conviction of the prisoner, and to transmit them to the Justices of gaol delivery, in order that they may decide upon the matter; and that law is confirmed by the statute of 1 & 2 *P. & M.* For what purpose was that statute passed? It was not passed to give the Justices or Coroners authority judicially to decide upon the cases brought before them, but for the purpose of correcting those abuses which had grown out of the previous statute, 1 *Ric.* 3. referred to in the argument. By that statute, the magistrates were authorized to discharge the prisoner upon bail. The magistrates, it seems, abused the authority which that statute gave them, and had discharged persons upon bail who ought not to have been discharged; and therefore the stat. 3 *Hen.* 7. c. 3. was passed to restrain the authority of the magistrates,

1822.
Cox
v.
Coleridge.

By the first mentioned statute every magistrate was allowed to discharge persons at his discretion, to be on bail where they were only suspected of felony, whereby many offenders had escaped justice; and by the second, farther provisions were made for restraining the abuses which had grown up; but it being found that the statute *Hen.* 7. had not that effect, the 1 & 2 *P. & M.* was passed; not to give any judicial authority to the Justices to inquire into, and determine the cases brought before them, but to prevent the abuses which had existed under the preceding statutes. By 1 & 2 *P. & M.* the Justices, before they admit the party to bail, shall take the examination of the prisoner and the information of those who bring him, of the fact and circumstances of the felony, and the same or as much as shall be material to prove the felony, shall be put in writing before they make bailment. Why are they to take the examination? Why, in order that it may be seen whether they have abused there authority,—whether they ought to have bailed the party; and for this purpose the examinations are to be transmitted to the assizes; and it being found convenient that the Justices should have authority to take the examinations in all cases, the statute 2 & 3 *P. & M.* c. 10. was passed, which did that which the statute 1 & 2 *P. & M.* did not do, namely, direct the examination to be taken in cases of suspicion of felony only; to remedy which it was enacted, that the examinations should be taken in both cases and transmitted to the assizes. That shews most clearly, that the object of these statutes, was not to give the Justices judicial power to decide upon the subject, but to enable the Judge at the assizes to see whether the Justices had exercised proper authority in admitting the party to bail. That was the utmost extent of the view of the legislature in passing the first mentioned act; but that act not having gone far enough, the second was passed, so as to make it imperative upon the Justices to take the examinations in all cases whether the party was specifically charged with or only suspected of felony, and transmit the same to

1822.

Cox
v.
Coleridge.

the assizes for the information of the Judges; but neither of those statutes made the examination a judicial inquiry. I take it to be perfectly clear, therefore, that neither by the common law, nor under these statutes, does any such right exist, which is now claimed. If there be nothing in the common law or the statute law, to support it, then the pleas which the defendants have pleaded are an answer to this action. But it appears to me, that there is nothing in principle to support such a right. I know not what business this person has to come before the Justices to cross-examine the witnesses for the prosecution, and to offer opposing testimony on behalf of the prisoner. I am of opinion that he had no authority to do that, because it is clear, that previous to the statute 1 *Anne*, st. 2. c. 9., to which reference has been made, the examination of opposing testimony for the prisoner, could not have been received upon oath even upon the trial, and it would have been a most extraordinary thing, that the magistrates should receive opposing testimony on oath, when the same witnesses whom he had examined upon oath, could not have been so examined when the prisoner was put upon his trial. I am aware that they might have been examined without oath, but information given not upon oath, would not be any evidence on the part of the crown, though it was taken before the Justices, and such evidence would avail the prisoner nothing upon his trial, because the Justices are only bound to take so much of the evidence on oath as is necessary to prove the felony. It is said on the authority of Lord *Coke*, that opposing witnesses might be examined on oath previous to the statute 1 *Anne*, c. 9. I respect the authority of Lord *Coke* as much as any man, but his authority stands unsupported by any case. It is opposed by the general practice previous to the statute of *Anne*, and his opinion is opposed by several other statutes, but particularly by 31 *Eliz.* c. 4. against the embezzling of armour, and also by the statute of 1 & 2 *P.* & *M.* It appears to me that these statutes abundantly weigh down the authority of Lord *Coke*.

1822.

Cox
v.
Coleridge.

I cannot help observing, that though I do not agree in the law as laid down by *Dalton*, with respect to the duty of a Justice of the Peace in committing a man for trial, though he is satisfied of his innocence, yet it is fit for the Court to consider the state of the law at the time *Dalton* wrote. Since his time, Courts of Justice have been in the habit of construing the criminal law of the country, as favourably as possible to the liberty of the subject; but I have no doubt that *Dalton's* was the law at that time. Improvements however, have been made in this most important branch of the law, and advantages have been given to the subjects of the country which they had never before enjoyed. Amongst others is the great advantages arising from the statute 1 *Anne*, c. 9., which gives the prisoner the benefit of having his witnesses examined on oath upon his trial; and the inestimable advantage of the statute of *William*, which allows the party to make a full defence in cases of misdemeanour. For these reasons I am clearly of opinion that the claim which the plaintiff attempts to make is not made out, and that the defendants are entitled to judgment. This point has indeed been already decided by *Rex* v. *Borron*. My Lord Chief Justice in giving the judgment of the Court in that case, (which was well considered by every one of the Judges) decides this very question. I admit undoubtedly, that the decision of that case, turned upon another ground, but still it must be considered as an authority solemnly decided. At the same time I do not feel myself so bound by that case, as not to reconsider it if it should ever become necessary; but, independently of that case, I am clearly of opinion that this right is not made out, and I come to this conclusion, without reference to the judgment in the case to which I have alluded.

Judgment for the defendants.

1822.

FOWLE, Executor of WOODMAN, *v.* WELCH.

Friday, Nov. 15.

In a declaration on an indemnity bond, to "save harmless and keep indemnified *W.* his heirs, &c. and also certain closes, &c. from and against all *actions, suits, claims, and demands whatsoever, both in law and equity,* which should or might be had, made, commenced, or prosecuted by any person or persons claiming any right, title, or demand, in, to, or upon the said closes, &c. as heir at law of *H. P.* and others, of and from all costs, charges, and expences which the said *W.*, &c. should sustain or be put to, for or by reason or means of such actions, suits, claims, and demands, or otherwise howsoever;" to which the breaches assigned were, first, that on, &c. *H. W. P.* "made claim, and demand and claimed to have a right and title of, into, and upon the said closes, &c. and entered into and upon the same, and cut down grass, and felled trees there growing, and converted them to his own use;" and, second, that he "caused and procured, and suffered and permitted, one *H. B.*, who then held and enjoyed the said closes, to attorn to him, and to withhold the payment of the rents, issues, and profits;" and, third, that "certain title deeds relating to the said closes, &c. were kept, detained, and withholden by one *A. W.*, at the instance and through the means, and by and through the claim and demand of *T. B. W. P.*" &c.—Held, after defendant had pleaded over, that these breaches were well assigned on the covenant declared upon.

COVENANT by the executor of a covenantee, against a covenantor of an indemnity bond. The declaration set out the deed, bearing date 12th *September*, 1812, which recited, that by an indenture of release, dated 28th *September*, 1811, executed with a lease for one year preceding that date, one *Thomas Bakewell White Parsons*, in consideration of 2800*l.* did grant and release to one *Aaron Blandford*, certain lands, to hold to him, his heirs and assigns for ever, to certain uses;—that one *Henry Parsons* was seised of the fee-simple and inheritance of the said lands, and on the 19th *July*, 1793, by will devised them to his nephew, *John White Parsons*, for life, with remainder to his great nephew, *Henry White Parsons*, in fee;—that *John White Parsons* conceiving himself entitled to the lands in fee, sold part of them, and the other part, mentioned to have been sold to *Aaron Blandford*, he mortgaged to one *Ann Welch* for 700*l.*, to secure which sum with interest he deposited in her hands an assignment, by way of mortgage, of the title deeds of the lands, and afterwards, by will, devised the lands to his second son, the said *Thomas Bakewell White Parsons*, in fee;—that since the death of *John White Parsons*, the said *Henry White Parsons*, as heir at law of the said *Henry Parsons*, commenced actions of ejectment for the recovery of that part of the lands sold by his father, and recovered the same, but that no action had been com-

1822.

FOWLE v. WELCH.

menced against the said *Ann Welch*, for the recovery of the title deeds of the land purchased by *Aaron Blandford*; that on the 21st *June*, 1810, *Henry White Parsons*, by indenture of lease and release, conveyed the fee simple of the lands to *Thomas Bakewell White Parsons*;—that *Aaron Blandford* had previously borrowed of *W. Woodman* (the plaintiff's testator) 2000*l.* to secure which he had by an indenture of release (the same in the commencement of the recital), granted the lands to him, *W. Woodman*, to hold, subject to a proviso for redemption, whereby *Aaron Blandford* and the defendant agreed, that until the said 2000*l.* was repaid, they "would save harmless and keep indemnified the said *W. Woodman*, his heirs, &c. and also the said closes, hereditaments, and premises, of, from, and against all actions, suits, *claims, and demands* whatsoever, both *in law and equity*, which should or might be had, made, commenced, or prosecuted by any person or persons claiming any right, title, or demand, in, to, or upon the said closes, &c. as heir at law of the said *Henry Parsons*, deceased, or *John White Parsons, Henry White Parsons, Thomas Bakewell White Parsons*, or any other descendant of the said *Henry Parsons*—of and from all costs, charges, and expences which the said *W. Woodman*, &c. should sustain or be put to for or by reason or means of such actions, suits, claims, and demands, or otherwise howsoever." The declaration then averred the non-payment of the 2000*l.* and assigned as breaches, first, that on the 13th *September*, 1813, *Henry White Parsons* "made a claim and demand, and claimed to have a right and title of and in, to and upon, the said closes, &c. entered into and upon the same, and cut down grass, and felled trees there growing, and converted them to his own use;" second, that he "caused and procured, and suffered and permitted one *H. B.*, who then held and enjoyed the said closes, &c. of the yearly value of 100*l.* to attorn to him, and to withhold the payment of the rents, issues, and profits," &c. from the testator in his life, and from the plain-

tiff since his decease, for the space of five years;—and that "certain indentures of lease and release, and other deeds, papers, and writings, being the title deeds of and relating to the said closes, &c. were kept, detained, and withholden by one *Ann Welch*, at the instance and through the means, and by and through the claim and demand of the said *Thomas Bakewell White Parsons*, in the said deed mentioned." Pleas; first, non est factum; and second, that, neither at the time of making the deed, nor at any time since, had *Henry White Parsons* any lawful right, title, claim, or demand whatsoever, of, in, to, or out of the said closes, &c. concluding with a verification. Replication to the first plea, a similiter, and to the second, a special demurrer, assigning the following causes of demurrer;—that the said plea does not sufficiently state either in terms or in substance, that the covenant to which it purports to be an answer has been performed, but tenders in that respect a collateral issue;—that the said plea passes over the several matters assigned in the first breach of the declaration, and tenders thereto an immaterial issue; that the said plea attempts to refer matter of law to a Jury, its import and effect being, that the covenant in the deed ought to bear a limited construction as attempted to be put upon it in the said plea;—that the said plea attempts to put in issue two several matters, namely, whether the party named therein had any claim upon the premises, and, secondly, whether his claim was lawful;—and that the said plea concludes with a verification, whereas, if the matter contained therein were pleadable, it should have concluded to the country. Joinder in demurrer.

Littledale, in support of the demurrer. These pleas are clearly insufficient. It is no answer to this declaration to say that *Henry White Parsons* had no lawful right to the estate, nor does that circumstance at all affect the case. The covenant is to save harmless from all "claims in law or

1822.

FOWLE
v.
WELCH.

equity," that is, not all "lawful or equitable" claims only, but all claims such as might from their nature be attempted to be inforced in a court of law or equity. But it is objected, that the acts set out in the breaches are not "claims in law or equity," because they are tortious acts. The first may perhaps be called a trespass, but an act of trespass may be a claim in law, and an entry upon land may, from the necessity of the case, become a mode of legal redress. Then, as regards the attornment of the tenant, if *Parsons* had brought an action against the tenant for not attorning, that would clearly have been a claim in law, and by persuading him to attorn instead, he in effect only took a more simple mode of making for himself the same claim as the suit at law would have made for him. Then, as to the detention of the title deeds, there can scarcely be a more explicit method of claiming title; but argument on that point is unnecessary, because an action was the result of that claim, which in itself proves it to have been a claim "in law." Then the general principle is clearly in favour of the plaintiff, for it has always been held, that covenants such as this should be extended to the utmost for the protection of the covenantee, and that where a bond is special against the acts of a particular person, the obligor is bound to protect the obligee against the wrongful acts of that person. He cited *Wilson* v. *Maples* (*a*), *Southgate* v. *Chaplin* (*b*), *Perry* v. *Edwards* (*c*). *Lloyd* v. *Jenkins* (*d*), and *Nash* v. *Palmer* (*e*).

This last-mentioned case the Court had in the outset of the argument suggested to be decisive of the question.

R. Baily, contrà.—This declaration is manifestly bad, because the breaches do not assign any claim or demand "in law or equity;" which words being found in the deed,

(*a*) Cro. Eliz. 212. Hob. 35, and Vaugh. 127.
(*b*) 1 Com. Rep. 230.
(*c*) 1 Stra. 400.
(*d*) 1 T. R. 671.
(*e*) 5 M. & S. 371.

ought also to be found in the declaration founded upon, and setting out that deed. The cases cited in support of a different argument on the other side, are all materially distinguishable from this; for in them the covenants are one and all of them to indemnify against *acts*, not against *claims*; and although it is perhaps too late now to argue against the principle laid down in the case of *Nash* v. *Palmer*, still, giving that principle its fullest operation, it does not control the present case, because the breaches here are, that claims have been made, whereas in that case they were that acts had been done, in disturbance of the covenantee. The word "claims" does not stand alone in the deed; the words "actions" and "suits" accompany it; noscitur a sociis, the context explains its meaning, which clearly was made by an action or suit, in law or in equity. The intention of the parties must be considered, and it is quite clear that the defendant at least intended only to indemnify against lawful claims. The circumstances of the case are so peculiar, that it is in vain to look for any case precisely in point as a direction for the decision of the Court, but arguing upon general principles of law, and the fair acceptation of terms, the judgment of the Court must be for the defendant.

ABBOTT, C. J.—Upon the authority of the case of *Nash* v. *Palmer* (*a*), which has been referred to, and which is only in confirmation of the older case of *Wilson* v. *Maples* (*b*), and perhaps of some others, it is clear that this covenant is not in its import confined to lawful suits, that is, suits or claims brought by a person having a right either in law or equity, but extends also to those which may be without right. That being so, the next question is, whether sufficient appears upon the face of this declaration (the defendant having pleaded over, and not demurred) to shew that the claims which are made by *Henry White Parsons*, are "claims and demands in law or in equity." I think it is impossible to

(*a*) 5 M. & S. 374. (*b*) Cro. Eliz. 212.

1822.

FOWLE v. WELCH.

say that the words "claims and demands," which are found in this covenant, can be taken to be synonomous to "*suits* in law or in equity," and if so, we must give effect to the words "claims and demands," according to their ordinary signification. Those words, I think, must be understood to mean, something more than actions or suits. They are words which are extremely well known and understood in this Court, are in constant use in covenants, and are always understood to mean something more than actions or suits. Then, is there enough in this case to shew that there was any claim in law? Now, the first breach alleges, not merely that *Henry White Parsons*, "made claim and demand, and claimed to have a right and title of and in, to and upon, the said closes," which a mere trespasser or wrong doer might do; but it also alleges, that he "*entered* into and upon the same, and cut down grass, and felled trees there growing, and converted them to his own use." Entry is one legal mode of redress, properly belonging to the person who has title, and if he enters and obtains possession, may he not do so without having recourse to a Court of law? Of that I think there can be no doubt whatever. The second and third breaches, I confess, admit of more doubt, but I think they are well assigned, there being no special demurrer. The second breach states, "that the said *Henry White Parsons*, caused and procured, and suffered and permitted one *H. B.* who then held and enjoyed the said closes, to attorn to him, and to withhold the payments of the rents, issues, and profits from the testator in his life-time, and from the plaintiff since the testator's decease." Now, that is one mode of enforcing title to the estate, and of insisting upon the right of possession. Surely the man who, by his representations to a tenant, of his own title to an estate, induces the tenant to treat him as his landlord, does an act which amounts to a claim in law to the estate itself. I am clearly of opinion, that this act also amounts to a claim in law. The third and last breach is, "that *Ann Welch* kept and

detained the title deeds at the instance and through the means of *T. B. W. Parsons*," in the deed mentioned. Though that is an act done by her, still it is an act done by the procurement of *T. B. W. Parsons*, and it is the same as if it was done by himself. Withholding the title deeds of an estate, is, in its nature, one of the strongest acts which can be resorted to for the purpose of asserting title. All these acts are in their nature claims and demands at law; and although these breaches might be more perfectly assigned, yet as they are not demurred to specially, and as the defendant has pleaded over, I am of opinion, regard being had to the whole of this record, that the plaintiff is entitled to judgment. I think this case is to be decided by the principle laid down in *Nash* v. *Palmer*, namely, that where a particular individual is named in the bond, the covenantor is presumed to know who he is, and is therefore expected to save harmless from any act of his, whether founded in lawful title or not. Upon the grounds I have stated, I think judgment must be given for the plaintiff.

BAYLEY, J.—I am of the same opinion. This being a covenant in which *John White Parsons* is specially named, the defendant's counsel I apprehend concedes that the words "claims and demands" would apply to his claim, whether rightful or wrongful, provided "all actions, suits, claims, and demands whatsoever, both in law and equity," extend to the claims in question; but it is contended, that those words do not extend to such claims as are alleged in the breaches in question. Now it is to be observed, that all covenants are to be taken in the strongest sense against the covenantor. The Court certainly is bound, if possible, to come at the meaning of the parties; but the rule is, where there is any doubt in that respect, to construe the language of the covenant most strongly against the covenantor. Here the party covenants against all actions, suits, claims, and demands whatsoever, both in law and equity. The first

1822.

FOWLE
v.
WELCH.

breach assigned is, that *Henry White Parsons* made claim and title to the estate, and also entered upon it, and did certain acts for the purpose of asserting his right. He couples his claim of title with acts in assertion of his claim. I think the Court is fully at liberty to consider, in the absence of any special demurrer, that this breach is well assigned, inasmuch as the claim made amounts to a claim in law. The breach is not merely that *Henry White Parsons* claimed to have right and title, but it goes on further to state, that he *entered* upon the premises and exercised acts of ownership. Entry is one of the legal remedies which the party, having a right, vests himself with, and by exercising that right he stands in a better situation as to many of his remedies than he did before. It seems to me that the first breach, which alleges that the party had made claim and demand, and entered and exercised acts of ownership upon the estate, is sufficient (though this be not done rightfully) to bring the case within the meaning of this covenant, as being a claim and demand made in law. The second breach, to which objection has been made, does not specially allege that that which was done was done under a claim of title; but it is alleged that *Henry White Parsons* had caused the tenant in possession to attorn to him. Why then that was making the tenant recognize him as his landlord, and if a man compels or prevails upon a tenant to recognize him as his landlord, I think that must imply from the nature of the thing, that he claims title at the time when he requires the tenant to attorn. When a man requires a tenant to attorn to him, we must assume that he is insisting upon the attornment in virtue of his title as landlord of the premises. The act of attornment has this effect, that it makes the possession of the tenant the possession in law of the party to whom he attorns. The third breach is rather larger than the second, for it only states that the title deeds relating to the closes, were "kept, detained, and withholden, by one *Ann Welch*, at the instance and through the means,

and by and through the claim and demand of the said *T. B. W. Parsons*." Still, however, that is an act done under his claim and demand, and it is a claim and demand by him to the possession of the title deeds belonging to the estate. But although I think this breach might have been bad if specially demurred to, on the ground that there was no distinct allegation that he did that under a claim and demand in law, yet as the defendant has pleaded over, it seems to me, that this breach is sufficiently assigned. On these grounds I am of opinion that the breaches are well assigned, and that the demurrer is well founded.

HOLROYD, J.—I am of opinion that the breaches of this covenant are well assigned. The objection made by the defendant's counsel, and the construction which he puts upon the covenant, would extend as well to the case of a lawful, that is, a rightful, entry and claim, not followed up by any action of ejectment, as to an entry under claim of right, though not founded in right. But it is clear, from the cases of *Wilson* v. *Maples*, and *Nash* v. *Palmer*, that the present covenant, whatever may be the import of the words, extends to any claim or demand at law or equity, whether rightful or wrongful. It is insisted, however, that the words "claims and demands whatsoever, both in law and equity," are to be construed to mean "rightful and lawful claims." I think the covenant is not so to be considered. An entry, for the purpose of claiming right to premises, whether the claim can be supported in law or not, is, in my opinion, a claim in law. The entry under a claim of title, is a remedy which is given by the law, and if the party enters and gets possession, it is an ouster, and drives the other party to his action. So that if a person enters even by right, instead of bringing an action, that case would not be within this covenant, if it is to have the limited construction which is now attempted to be put upon it. I am clearly of opinion, therefore, that the entry alleged in the first breach is a claim

1822.
FOWLE v. WELCH.

of title, and amounts to a "claim and demand in law." The second breach, by which it is alleged that the party procured the tenant to attorn to him, implies a claim of right; and I think is an act done under a claim of right, which amounts to a claim at law. Then as to the third breach, I likewise think, that is well assigned, there being no demurrer to it; but I am inclined to think, that it would be good in either case. I certainly can conceive no instance of any person being entitled to the title deeds, except in respect of his right and title to the estate itself. They are always claimed as appendages to the land, and necessarily import a claim of right to the land. It has always been considered, that a claim to title deeds, is a claim and demand in law to the estate itself. I therefore think, that the third breach is well assigned, and consequently, the plaintiff is entitled to judgment (a).

Judgment for the plaintiff.

(a) *Best*, J. was absent.

Friday, Nov. 15.

DANIEL HARVEY and Others, Assignees of MATTHEW BARNARD HARVEY and Another, Bankrupts, v. RAMSBOTTOM and Others.

Where an aged member of a banking firm was arrested on the 20th of *May*, at his private dwelling, distant several miles from the house of business, for a partnership debt, and after the sheriff's officer was prevailed upon to withdraw, upon a promise of his executing a bail bond when required; he reproached his servants for letting such persons into the house, and ordered them not to let any person into the house they did not know, stating that he was afraid of being arrested again; and next day the servants did not open the door without ascertaining from the windows what persons required admission, and the outer gate of the house was kept locked; and it further appearing that on the 21st of *May*, he removed from one apartment of the house to another to avoid being seen by a person who called, whom he supposed to be a creditor:—Held, that he committed an act of bankruptcy on the morning of the 21st of *May*, within the meaning of the words of 1 *Jac.* 1. c. 15. s. 2. "to the intent *or whereby* his creditors *shall* or *may* be defeated or delayed," and which are to be read "to the intent his creditors *shall*, or whereby (or that thereby) they *may* be defeated," &c.

ASSUMPSIT for money had and received by the defendants, to the use of the plaintiffs, as assignees of *Matthew Barnard Harvey*, and *John Whittle Harvey*. At the trial

before *Abbott*, C. J. at the London adjourned Sittings after *Hilary* Term, it was contended on the part of the plaintiffs, that both the bankrupts had committed acts of bankruptcy as early as the morning of the 21st *May*, 1814. The Jury, under the direction of the learned Judge, found a verdict for the plaintiffs, and it was agreed that the damages should be referred; but on a motion being made on the part of the defendants, in the following Term for a new trial, on the ground that *Matthew Barnard Harvey* had not committed an act of bankruptcy, under the circumstances, the Court directed the following case to be made:—

In the beginning of *May*, 1814, and for some years previously, *Matthew Barnard Harvey*, and *John Whittle Harvey*, carried on business as bankers, at *Rochford* and *Billericay*. *Matthew Barnard Harvey* lived at *Witham*, which is miles from *Rochford*, and miles from *Billericay*. On the 16th *May*, in that year, *John Whittle Harvey* committed an act of bankruptcy, by absconding with a large sum of money belonging to the partnership; on the 20th of the same month, *Matthew Barnard Harvey*, having heard of his partner's absconding, sent for two of his private tradesmen at *Witham*, and paid their bills, stating to one of them that he was ruined, and did not wish any tradesman to lose any thing by him. In the evening of the 20th *May*, *Matthew Barnard Harvey* was arrested in his own house at *Witham*, for upwards of 1400*l.* upon a writ against him and *John Whittle Harvey*, by an attorney whose name was in the warrant, in company with another person. *Matthew Barnard Harvey* said it was not a partnership debt, he had nothing to do with it, and desired the officer to let him send for his son *Daniel Whittle Harvey*, who was a professional man, and he promised the officer that he should have access to him on the following day. After the departure of the officer, *Matthew Barnard Harvey* expressed himself angrily to his servants for having let those men in; his two servants assisted him to bed, and he desired them not to let any person into

1822.

HARVEY v. RAMSBOTTOM.

the house they did not know, stating that he was afraid of being arrested again, and that if he was ruined himself he did not wish to ruin any body else, and did not wish to have any body bound for him. In consequence of this, on the next day, the 21st, the servants did not open the door without ascertaining from the window what persons required admission. The key of an outside gate was delivered by one *Turner*, who used to work in the garden, to one of the servants in the house. The servants kept the house in this way until *Daniel Whittle Harvey*, the son and attorney of the bankrupt, arrived in the afternoon of the next day, *Saturday* the 21st, but no person called upon the said *Matthew Barnard Harvey* during that time. On that day, *Saturday*, after *Daniel Whittle Harvey* arrived, he went to the officer, who went up with him to *Matthew Barnard Harvey*'s house, and a bail bond was given immediately. One of the plaintiffs came that day, and a Mr. *Medina* called about nine o'clock in the evening, and rung at the bell, and was let in. He asked to see *Daniel Whittle Harvey*. Mr. *Daniel Whittle Harvey* had directed the servant, in the presence and hearing of Mr. *Matthew Barnard Harvey*, not to let him (*Matthew Barnard Harvey*) be seen, and desired he might be got up stairs immediately. *Daniel Whittle Harvey* was told that *Medina* had asked for him, and he went to talk to *Medina*, and said he would keep him in talk while the servant got their master (who was seventy years old, and paralytic) up stairs. *Matthew Barnard Harvey* went up stairs most part of the way by himself, which he had not done since his illness; he went without his stick; he had been ill two or three weeks, and had never got well since. *Medina*'s dealing with the bankrupts was this; he had exchanged an acceptance with the bankrupt for his accommodation for 2000*l.* a few days before, and he went to inquire about the acceptance. He inquired for *Daniel Whittle Harvey*, and asked what was become of his bill, as he wished to get it back; and *Daniel Whittle*

Harvey knowing the nature of his inquiries, and that he had no claim upon his father, and thinking his father too ready to communicate, and that he might be entrapped by him, wished *Medina* not to see him. When *Medina* was gone, Mr. *Matthew Barnard Harvey* returned down stairs to supper. On *Sunday*, the 22d, the servants left the doors open as usual, understanding that no arrest could take place on that day. *Daniel Whittle Harvey* went away on that day. On *Monday*, the 23d of *May*, the doors were kept fast all the day; and on *Tuesday*, the 24th, *Matthew Barnard Harvey* left his house at *Witham*, and went to *Rochford*, to the house of *John Whittle Harvey*, for the purpose of paying the notes of the house, and he continued there, visible to every body, and paid all the notes that appeared until no more were brought forward; he then returned to *Witham*. On the 24th the defendants made a large advance of cash to *Matthew Barnard Harvey*. The question for the opinion of the Court was, whether *Matthew Barnard Harvey* committed any act or acts of *bankruptcy* under the circumstances, and if he did, at what time the interest of the assignees, by relation to the act of bankruptcy, accrued.

F. Pollock, for the plaintiffs, contended, that under these circumstances an act of bankruptcy had clearly been committed. There was no doubt that on the *Saturday* and *Monday* the servants kept the house secure by their master's directions; and as he was within it during that time, it would be difficult to say that he was not then "keeping house." It was true no creditor was actually delayed, but that was not material, for the closing the house upon himself, with the intent to prevent creditors from having access to him, was of itself an act of bankruptcy, even though no creditor in fact applied for admittance. The statute 1 *Jac*. 1. c. 15. s. 2. was to be read "to the intent his creditors *shall*, or whereby they *may*, be defeated," and left the question

1822.

HARVEY v. RAMSBOTTOM.

whether they *are* defeated as unimportant. But in this case there was evidence of the intent, for the party was denied; a denial might be for honest purposes; but unless so explained, it was cogent evidence of the intent with which the party denied "keeps house:" nor was that all, for here the party actually absented himself, by removing up stairs with greater alacrity and ease than he had long done, expressly for the purpose of avoiding a person whom he supposed to be a creditor. Many more arguments might be adduced; but these were quite sufficient to convince the Court that Mr. *Harvey* had began to keep house, *and otherwise* absented himself, with intent to avoid his creditors, and therefore had committed an act of bankruptcy. He cited *Robertson* v. *Liddell* (a), *Bayly* v. *Schofield* (b), and *Chenoweth* v. *Hay* (c).

J. Parke, for the defendant, insisted, that the true construction of the statute, and that which would be found to be supported by the most numerous and respectable authorities, was, that both an intent to delay, and an actual delay, must concur, in order to constitute the keeping house, an act of bankruptcy; and in the present case neither of these requisites had been clearly or satisfactorily proved. Indeed, the evidence of a keeping house at all, was of a very questionable kind. Here was a gentleman, far advanced in years, in an infirm state of health, and of very retired habits, not in his place of business, but at his country house, anxious to avoid the intrusions of visitors. This was all that it amounted to. It was said, on the other side, that he went from one floor in the house to another to avoid a person whom he supposed to be a creditor; but even if he did so, that would not make his removal "an absenting;" the party avoided must really *be* a creditor to make the avoidance of him an act of bankruptcy. *Dudley* v. *Vaughan* (d).

(a) 9 East, 487.
(b) 1 M. & S. 338.
(c) 1 M. & S. 676.
(d) 1 Campb. 271.

1822.

HARVEY v. RAMSBOTTOM.

It had not been even pretended that any actual delay of any creditor took place, and therefore the only remaining question was, whether Mr. *Harvey's* conduct was such as to justify the conclusion, that he had an intent to delay his creditors? There seemed to be no evidence to ground this conclusion; all that appeared being, that feeling alarmed and uneasy about his own situation, he was solicitous to postpone every interview with visitors of all kinds, until he had seen his own professional adviser. Upon either construction, therefore, of this statute, no satisfactory or complete act of bankruptcy had been proved. He cited *Heyler* v. *Hall* (a), *Jackman* v. *Nightingale* (b), *Hawkes* v. *Sanders* (c), *Garret* v. *Moule* (d), (as over-ruling an adverse decision in *Dickenson* v. *Foord* (e),) *Fowler* v. *Paget* (f), and *Bernard* v. *Vaughan* (g).

ABBOTT, C. J.—The question before the Court is so perfectly free from doubt and difficulty, that I confess I feel some surprise that it ever was suffered to form the subject-matter of a special case for argument, for there is really nothing to argue in it. The words of the statute are, "or begin to keep his house, or otherwise to absent himself, to the intent or whereby his creditors shall or may be defeated or delayed," &c. I think the true construction of this clause is, that the keeping the house fastened, and suffering no person to come in, for fear a creditor might come, is keeping house with intent to delay that creditor, and that (if an absenting be necessary, which perhaps it is) the removal from one room to another, for the purpose of avoiding a person *supposed to be* a creditor, is an absenting with the like intent. Then what are the facts of this case? Mr. *Harvey* is arrested; he tells his servants that he is

(a) Palmer, 323.
(b) Bul. N. P. 38.
(c) Cooke, 94.
(d) 5 T. R. 575.
(e) Barnes, 160.
(f) 7 T. R. 509.
(g) 8 Ibid. 166.

1822.

HARVEY v. RAMSBOTTOM.

afraid of being arrested again, and orders them to admit no person whom they do not know. The house in consequence is kept guarded; the key of the outer gate is brought in; and when a person does obtain admission, Mr. *Harvey* precipitately retires, and his son goes to keep the visitor in talk while his father effects his retreat. The house is thus guarded on *Saturday* in a new and unusual mode; is left unguarded and in its usual state on *Sunday*; and on *Monday* is guarded again. I think it is utterly impossible, upon these facts found, to doubt that Mr. *Harvey* did fear arrest, and that he kept in his house (it being locked), and removed from one part of it to another for the purpose of preventing that arrest, and of avoiding any creditor who might call upon him; and I am equally decided in my opinion, that in so doing he committed, at the least, one act of bankruptcy. Under all the circumstances I think the interest of the assignees may properly be considered as accruing on the *Saturday* morning.

The rest of the Court concurred.

Judgment for the plaintiffs.

Saturday, Nov. 16.

BROOKS *v.* CLARK.

Affidavit "that *W. C.* is justly and truly indebted to this deponent in the sum of 44*l.* 11*s.*, being the amount of a certain inland bill of exchange, drawn by the said *W. C.* on this deponent, and by him accepted for the honour of the said *W. C.*, payable to the order of the said *W. C.*, at a day now past, and which said bill of exchange was paid by this deponent," discloses a sufficient cause of action to hold the defendant to bail; and held, that a declaration containing the money counts only, for the amount of the bill, was no variance from the affidavit.

CAMPBELL moved for a rule to shew cause why the bail bond, in this case, should not be given up to be cancelled, and all proceedings in the action set aside, on two grounds, first, that the affidavit of debt did not state any

1822.
BROOKS v. CLARK.

sufficient cause of action; and, second, that there was a variance between that and the declaration. The affidavit of debt was in these words, "that *William Clark* is justly and truly indebted to this deponent in the sum of 44*l.* 11*s.*, being the amount of a certain inland bill of exchange, drawn by the said *William Clark* on this deponent, and by him accepted for the honour of the said *William Clark*, payable to the order of the said *William Clark* at a day now past, and which said bill of exchange was paid by this deponent." The declaration was upon the money counts only.

HOLROYD, J. (*a*)—I do not think these objections present any sufficient ground for setting aside the proceedings. The requisites of an affidavit of debt are, that it shall be certain and explicit as to the nature of the cause of action, and, as it seems to me, the defendant, upon reading this affidavit, could not have any reasonable doubt upon that subject; nor do I perceive any material variance between the affidavit and the declaration, because it is clear that money paid on a bill, under circumstances such as the present, may be recovered on a count for money paid to the defendant's use.

Rule refused.

(*a*) The only Judge in Court.

Saturday, Nov. 16.

GIRDLESTONE *v.* ALLAN.

It is discretionary with the Court, whether they will give relief under s. 4. of the Annuity Act, 17 *Geo.* 3. c. 26.

Where, after the consideration of an annuity had been paid to the grantor, the latter immediately paid back to the grantee (who was in partnership as an attorney with two other persons) a sum for procuration money, in pursuance of an agreement for that purpose, and there appearing to be no fraud or collusion:— Held, that the deeds were not void by the 4th section of the statute, and that the Court might impose such terms upon the parties as seemed just and reasonable.

IN last *Trinity* Term a rule was obtained, calling on the plaintiff to shew cause why certain deeds, whereby an annuity of 1050*l.* was granted to him by the defendant for the life of the latter, and the bond and warrant of attorney for securing the payment of the same, and all other securities relative thereto, should not be delivered up to be cancelled, and why the judgment entered up thereon should not be vacated, on the ground that part of the consideration-money for the purchase of the annuity, was returned to the plaintiff. Cause being shewn last Term, it was suggested by the Court that the annuity should be reduced from 15 to 10 per cent., to be computed from the time then mentioned, and continue at such reduced rate for the rest of the defendant's life. To this the plaintiff assented, but in the absence of the defendant, the rule was enlarged until the present Term, in order to give him an opportunity of adopting such suggestion, if he thought proper; but the defendant having declined the proposition, the rule now came on to be discussed upon the merits. It appeared from the affidavit of the defendant, that in *November*, 1810, he was desirous of raising a sum of 7000*l.* by way of annuity, to be charged on certain freehold, copyhold, and leasehold estates, of which he was tenant for life, in possession, in the county of *Durham*. The plaintiff, who is an attorney of this Court, carrying on business in co-partnership with two other attornies, named *James* and *John Bellamy*, agreed with another person, named *James Watson*, to purchase of the defendant a life annuity of 1050*l.* in consideration of the sum of 7000*l.* to be secured on those estates, in the proportions, of 4000*l.* to be paid by the plaintiff, and 3000*l.* by *Watson*. By indentures of lease and release, of the 24th and 26th days of

November, 1810, (reciting the contract entered into by the plaintiff, and *James Watson*, with the defendant, for the purchase of the annuity, the security for the payment of which was to be taken in the name of the plaintiff only, and reciting also an agreement, that *defendant should pay all the expences attending the procuring of the money, and the preparation of the securities*), the defendant, in consideration of the sum of 7000*l.* paid to him by the plaintiff, granted to the plaintiff the annuity in question in trust for himself and *James Watson*, secured upon the defendant's estates. The plaintiff and his partners, Messrs. *James* and *John Bellamy* were the only attornies engaged in transacting the business of the annuity with the defendant, and in preparing the securities for the same; and as such attornies acted as well for the plaintiff as for the defendant in the transaction. The parties met on the 26th of *November*, 1810, when the plaintiff paid to the defendant 7000*l.* the consideration-money of the annuity, upon which the defendant immediately returned to the plaintiff out of the 7000*l.* the sum of 235*l.* being the amount of the bill of the plaintiff and his partners, charged to the defendant, relative to the procuring of the money, and the preparation of the securities for the annuity. In the bill was the following item of charge, viz. "Fee on negociating the annuity, and for many letters to you and Mr. *Corfield*, and attendances on Mr. *Watson* thereon, at 10*s.* per cent.—35*l.* : 0*s.* : 0*d.*" The affidavit of the plaintiff stated, that the defendant had expressly agreed to pay all the charges relating to the negociation of the annuity; that at the time of such agreement, the defendant knew that the plaintiff was then a practicing attorney and solicitor; that previous to the preparation of the securities for the annuity, defendant wrote to plaintiff as follows:—"I have no objection to your drawing the deeds, and it will not be necessary for any solicitor on my part, as having belonged to the profession, I have always taken that upon myself. The expence of an annuity redeemable is of course paid by the

1822.
GIRDLESTONE
v.
ALLAN.

grantor;" that the negociation for the annuity was carried on, and the several securities for the same were prepared, perfected, and memorialized by plaintiff as a solicitor in partnership with *James* and *John Bellamy*, in the regular course of business; that the deed of the 26th of *November*, 1810, recited the agreement by which the defendant bound himself to pay all the expences attending the procuration of the annuity, and the preparation of the securities for the same; that the full consideration-money was paid to the defendant, and that no part of it was held or retained from him; that after the money was paid, and the securities executed, the defendant paid to the plaintiff the bill of charges of him and his partners relating to his annuity, but deponent could not now say whether the same was actually paid out of the consideration-money, or out of other monies of the defendant. The affidavit then went on to detail negociations which had afterwards taken place between the plaintiff and the defendant, for the reduction or redemption of this annuity, and other annuities granted by the defendant to other persons by transferring them to other securities, and that until within the last twelve months no objection whatever was taken by the defendant to the validity of this transaction; that the purchase of the annuity in question was a fair and bonâ fide transaction, and without any fraud or collusion on the part of *James Watson*, or the plaintiff; that the bill of charges, amounting to 235*l.* was made out by plaintiff in the names of his partners and himself, and was justly due to them as partners; that the sum of 235*l.* was paid by the plaintiff to the account of the partnership, and that no part thereof was retained by him otherwise than as one of the partners; and that the defendant did not at the time of the delivery or payment of the bill, or at any other time since, make any objection thereto, or to any of the charges therein contained. The objection to the annuity was, that inasmuch as part of the consideration had been thus returned to the plaintiff by defendant, it was absolutely void by 17 *Geo.* 3. c. 26. s. 4.

Scarlett and *Campbell* shewed cause against the rule, and contended, that this was not such a retainer of the consideration-money as was contemplated by the legislature. To support the objection taken in this case, it must be distinctly shewn that fraud and collusion existed. This is the construction to be put upon 17 *Geo.* 3. c. 26. s. 24, as well as upon the later statute 53 *Geo.* 3. c. 141. s. 6. The words "pretence," used in the first-mentioned statute, and "practices" in the latter, clearly mean such pretences and practices as are of a fraudulent nature, and where the money retained is kept back for a dishonest purpose. Nothing of that kind can be imputed in this case. On the contrary, all fraud is negatived by the plaintiff's affidavit, and it distinctly appears in both affidavits that the bill of charges was paid in pursuance of an express agreement; and it does not even appear that the money was retained for the plaintiff's own advantage. Upon this part of the case *Ex parte Mackenzie* (a), and *Coare* v. *Giblett* (b), are authorities. But even supposing the retainer of so small a sum of money was illegal, still it is not imperative on the Court to vacate the deeds absolutely, because they clearly have a discretion upon the subject, as appears by the case of *Cook* v. *Tower* (c). In the cases of *Berry* v. *Bentley* (d), *Poole* v. *Cabanes* (e), *Drake* v. *Rogers* (f), and *Barber* v. *Gamson* (g), the Court exercised a discretion by only setting aside the annuity upon certain terms. In the present case the whole of the transaction was perfectly fair; the money was paid in pursuance of an agreement by the defendant, who was himself a member of the profession, and therefore a competent judge of his own interests; the annuity has been paid for several years without objection, and it is not until a lapse of twelve years that this objection is suggested, and therefore, under such circumstances, it is an objection which is entitled to no favour.

(a) 4 Taunt. 323.
(b) 4 East, 85.
(c) 1 Taunt. 372.
(d) 6 T. R. 690.
(e) 8 T. R. 328.
(f) 2 Brod. & Bing. 19. S. C. 4 B. Moore, 402.
(g) 1 Barn. & Ald. 281.

1822.

GIRDLESTONE v. ALLAN.

Marryat and *Abraham*, contrà, relied upon the express words of the statute, and contended that this was an attempt to evade the wholesome provision of a law made for the protection of needy persons, who might otherwise, from necessity, be compelled to accede to any terms, however unreasonable, which the grantee of an annuity might think proper to impose. By statute 17 *Geo.* 3. c. 26. s. 4. it is enacted, that if any part of the consideration money be returned to the person advancing it, &c.; or if any part of the consideration *be retained on any pretence,* the grantor of the annuity may apply to the Court to stay proceedings on the judgment or action, and the Court may order the deed, &c. to be cancelled. Now these words are very general, and clearly include the present case. The words "retained on *any pretence*" exclude the consideration, whether the motive of the retainer be fair or otherwise; and it seems, that if the money be in fact retained out of the purchase money, the smallness of the amount is no answer to the objection. Here there is a sum of 35*l.* expressly retained for procuration money. The plaintiff is himself the grantee of the annuity, and though the bill is made out in his own name, and the names of his partners, that makes no difference, because he participates with them in the amount of the money so retained. If this be not a retainer within the meaning of the statute; there is no saying where the line is to be drawn, because upon the same principle the whole consideration might be retained without any objection whatever. Unless full effect is given to the words of the statute, the intention of the legislature must be frustrated. In the case of *Broomhead* v. *Eyre* (*a*), the annuity was set aside, on the ground that part of the consideration for the annuity had been paid back to the grantee for the procuration. The only difference between that case and the present is, that in this it was paid back to the partnership of *Bellamy, Girdlestone,* and *Bellamy*, of which firm the plain-

(*a*) 5 T. R. 597.

tiff was a member. But still the principle is the same, because the plaintiff, who is the grantee, participated in the charge for procuration. The case of *Hurd* v. *Girdlestone* (*a*), does not affect this argument, because there the charge for procuration had been inadvertently made, and had been paid by mistake; but here the charge is deliberately made, and expressly paid out of the consideration-money. Unless, therefore the Court is prepared to say that the words of the statute are not to receive their full effect, the annuity ought to be set aside.

ABBOTT, C. J.—Admitting the fact to be clearly established, that the sum of 35*l.* was retained out of the consideration, as a charge for the procuration of this annuity, the question then comes to this, whether, (regard being had to the language of the statute), it is imperative on the Court, absolutely to vacate the annuity, or whether they may not order that to be done, which appears to be right and just between the parties. I am of opinion, that it is not imperative upon us to vacate the annuity altogether, but, that we may impose such terms upon the parties, as the justice of the case seems to require. In the case of *Cook* v. *Tower* (*b*), which came before the Court of *Common Pleas*, upon the construction of the 4th section of 17 *Geo.* 3. c. 26. the language used by two of the learned Judges, warrants us in putting this construction upon the statute. There *Mansfield*, C. J. says, " the 4th section of the act gives relief, if any of the bills, with the privity and consent of the person drawing them, shall not be paid when due, or shall be cancelled without being paid; or if the consideration, or any part of it, is paid in goods, or if any part of the consideration is retained under pretence of answering the future payments of the annuity, or any other pretence. The rest of these expedients are every one, a manifest fraud upon the grantor: but the non-payment of the bills may happen either without

(*a*) 1 Marsh. 107. S. C. 6 Taunt. 8. (*b*) 1 Taunt. 372.

1822.
GIRDLESTONE
v.
ALLAN.

fraud or with fraud. The statute proceeds to enact, that if upon application, it shall appear to the Court, that such *practices* have been used, the Court may order the securities to be cancelled. It is difficult not to suppose, that the legislature, in using this expression, had in view something fraudulent, and that the law was meant to punish something dishonest and base." It ought to be observed in this case, that the statute itself does not make it imperative on the Court to vacate the securities, for it only says, that the Court *may* order the deeds, &c. to be cancelled; and upon this point, *Chambre*, J. makes these observations:—"A distinction is to be remarked in the language used in the act. The expression in the three preceding sections is, that the instrument shall be wholly null and void; the fourth only says, that it shall and may be lawful for the Court to cancel the deeds; which is of a very different import. Where those words have been construed to be imperative, they have been so held from the nature of the case: it is in this case discretionary with the Court, whether they will entertain the application." Since that, there have been four cases, in which the Court has exercised a discretion, by only setting aside the annuity upon certain terms, namely, the cases of *Berry* v. *Bentley*, *Poole* v. *Cabanes*, *Drake* v. *Rogers*, and *Barber* v. *Gamson*. The last mentioned case was determined by two of the learned Judges of this Court only; my Brother *Best* and myself, being absent when it was argued. The question there arose upon the 55 *Geo.* 3. c. 141. s. 6. an act of parliament, framed in terms nearly similar to that upon which this point arises. I entirely concur in the opinion expressed by the two learned Judges who decided that case. I think the Court has a discretion in cases of this kind; and it would be a monstrous thing to say that the Court had not. Adverting to the several instances mentioned in this act of parliament, a power is given to the Court to order the securities to be vacated; but I can hardly suppose that the legislature intended that in any one of these in-

1822.

Girdlestone v. Allan.

stances it should be imperative on the Court to vacate the annuity, and declare the deeds absolutely void, upon motion, without any regard whatever to the special circumstances of the case. I think it is impossible to suppose that the legislature meant to make it imperative on the Court to vacate the annuity deeds on a summary application, without adverting to the facts and circumstances of the case. I entirely concur in the opinion expressed by my Brother *Bayley* and my Brother *Holroyd*, in *Barber* v. *Gamson*, in this construction to be put upon the statute. Here is a most critical objection taken, and we are called upon to sustain it, and thereby vacate an annuity now of twelve years standing, merely because, at the time it was purchased, 35*l.* was paid out of the consideration, as a charge for procuration. Considering who the parties were, an attorney in partnership on the one side, and a gentleman at the bar on the other, we think it would be too severe a penalty, to declare this annuity null and void, merely because so small a sum was charged and paid out of the consideration, as the price of procuring the annuity. We are more especially led to this conclusion, from the circumstance that the plaintiff had offered to give up in the outset, a considerable portion of the annuity. Under all the circumstances of this case, we think this rule ought to be discharged on these terms, namely, that the annuity shall be reduced to 700*l.* to be computed from the month of *May*, 1818.

The rest of the Court concurred.

Rule discharged accordingly.

Same *v.* Same.

This was a similar application to set aside another annuity for 300*l.* granted to the plaintiff for the life of the

1822.

GIRDLESTONE v. ALLAN.

defendant, on the ground, that a sum of 10*l.* had been retained out of the consideration, as procuration money. This rule was also discharged, on the terms of the annuity being reduced to 200*l.* to be computed from *May*, 1818.

Rule discharged.

Monday, Nov. 18.

WOOLLEY, Executrix *v.* CLARK and Others.

Where a verdict was found for the plaintiff at nisi prius, for the damages in the declaration, subject to the award of a gentleman at the bar, and the arbitrator declined proceeding in the reference:— Held, that the plaintiff was entitled to judgment and execution forthwith, unless the defendant consented to refer the damages to another arbitrator.

THIS was an action of trover, for certain articles of stock in trade, tools, and implements, the property of plaintiff's testator in his life-time, which the defendants had wrongfully converted to their own use. On Not Guilty, the plaintiff recovered a verdict before *Abbott*, C. J. at the *Middlesex* sittings after last *Michaelmas* Term, when the damages were referred, by an order of nisi prius, to the arbitration of a gentleman at the bar. A rule nisi for a new trial had been obtained in *Hilary*, which was argued in *Easter* Term, and then discharged (*a*). The arbitrator declined proceeding in the reference, from motives of personal delicacy, having been originally consulted by one of the parties, and having answered a case sent to him upon the subject of this action. On a former day in this Term, a rule nisi was obtained, to shew cause why the plaintiff should not be at liberty to issue execution against *Kelly*, one of the defendants, for the value of the goods for which the action was brought, or why the arbitrator named in the order of nisi prius, should be at liberty to name another arbitrator, or why another arbitrator should not be named by the Court?

Archbold now shewed cause, and contended that the Court had no authority to grant a rule in any of the terms prayed.

(*a*) Vide ante, Vol. i. page 409.

1822.

WOOLLEY v. CLARK.

The verdict was taken for the damages in the declaration, subject to the award of a gentleman at the bar, specifically named. In the first place then, the Court could not order execution to issue, until the damages had been ascertained by the arbitrator; and the officer of the Court could not enter up the judgment until the terms of the order of nisi prius had been complied with; unless there was a perfect judgment, the Court could not order execution. Taking this to be clear, what authority, in the second place, had this Court to order the arbitrator chosen at nisi prius, to name another arbitrator, or what power had they to sitting in banc, to name another arbitrator? The defendant, against whom this application was made, complained that his case had not been heard, and that he had no opportunity of calling his witnesses at the trial. He, therefore, had good reason to object to the reference, and had a right to have his case fully considered by another Jury.

Brougham, contrà, was stopt by the Court.

ABBOTT, C. J.—I am of opinion, that we may give the plaintiff leave to take out execution forthwith, or the defendant must consent to go before some other arbitrator to assess the damages. This case has been decided by a tribunal, the most competent to decide it, namely, the Jury. Where there has been a trial, and the verdict has been ascertained by the Jury, and the parties agree that the damages shall be settled by an arbitrator, and if by any accident this is prevented, the Court has a right to look into the case, and see what the damages are, and allow execution to be taken out. This is a case of that description, and therefore, unless the parties agree to name another arbitrator, we will order execution to issue.

HOLROYD, J. (a)—It is admitted, that a verdict has been

(a) *Bayley*, J. was absent.

1822.
WOOLLEY v. CLARK.

taken in this case for some damages. By the practice of the Court, judgment and execution follow in ordinary cases as a matter of course. Where a verdict is taken, subject to a reference, and the plaintiff enters up judgment, and takes out execution in the ordinary course of practice, then the application of the defendant will prevent his doing so, in order that the justice of the case may be answered, and that the plaintiff shall not have his judgment and execution for more than the arbitrator finds to be due. But if, according to the practice, judgment and execution follow as a matter of course, some ground must be shewn by the defendant, why execution should not issue. Therefore, it is for the defendant in this case, to make an application to the Court, to prevent execution going for more than the justice of the case will warrant. If the defendant will now agree to refer the damages to some other arbitrator, such an application will become unnecessary, and the rule may be moulded accordingly.

BEST, J. concurred.

Brougham for the plaintiff, and *Archbold* for the defendant, then agreed to refer the damages to another gentleman at the bar, to ascertain the amount for which execution should issue, and the order of reference was made a rule of court.

1822.

ELLIS, Clerk, *v.* ARNISON.

Tuesday, Nov. 19.

A *ditch* is a *fence* within the meaning of the General Inclosure Act, 41 *Geo.* 3. c. 109. Therefore where the issue was, whether a certain allotment was bounded by a sufficient *fence* within the meaning of a Local Inclosure Act, which required that the allotments "should be *enclosed and fenced* on all such parts and sides as should not be directed to be fenced by any other proprietor, or as should not adjoin to any enclosed land, or be bounded by any river or *other sufficient fence*," and the proof was, that part of the locus in quo was bounded by an old deep ditch:—Held, that this was a sufficient defence within the meaning of the statute.

DECLARATION in covenant upon a lease of the small tithes of certain garden ground, in the parish of *East Moulsey*, in the county of *Surrey*. Plea, first, non est factum; second, that by a certain inclosure act for inclosing the waste of the said parish, of which plaintiff was perpetual curate, the commissioners therein named were empowered to allot to the curate, in lieu of all tithes, a certain proportion of the waste about to be enclosed, and did so allot the same, whereby the tithes and the rent before payable thereon, ceased, and were extinguished; similiter, to the first plea; and to the second, replication, that it was provided by the said act, that the said allotments so made to the said plaintiff "should be enclosed and fenced on all such parts and sides as should not be directed to be fenced by any other proprietor, or as should not adjoin to any inclosed land, or be bounded by any river *or other sufficient fence*, in the judgment of the commissioners, free of expence to the plaintiff, and averring that the said allotment, &c. was not fenced or inclosed according to the said act, and in the manner therein prescribed in divers parts thereof, which were neither directed to be fenced by any other proprietor, nor adjoined any inclosed lands, nor were bounded by a river *or other sufficient fence* in the judgment of the said commissioners." Issue thereon. At the trial before *Abbott*, C. J. at the *Middlesex* adjourned Sittings after last *Hilary* Term, the only question was, whether the allotment to the plaintiff, being partly bounded by an old deep ditch or drain only, was "bounded by a sufficient fence" within the meaning of this inclosure act. It was proved that the commissioners had adjudged it to be sufficient, but the learned Judge told the Jury, that in his opinion, a *ditch* was not a *fence* within the meaning of

1822.

Ellis v. Arnison.

the Local Inclosure Act, nor within the meaning of the General Inclosure Act, 41 *Geo.* 3. c. 109. ss. 13. 19. 24, 25, & 26, and therefore a verdict was taken generally for the plaintiff, with liberty to the defendant to move to enter a verdict for him on the second plea, if the Court should be of a different opinion.

D. F. Jones in *Easter* Term last obtained a rule nisi accordingly, and

Copley, S. G. now shewed cause against the rule, and contended, that according to the universal acceptation and use of the word "fence", it must mean something erected upon, and extending above the surface of the ground. The local act of Parliament required that the fence should be a good thriving quickset hedge, unless the allotment was bounded by a river or other sufficient fence. The question is, whether a ditch is a fence? It is perhaps impossible to find any judicial decision upon such a question as this, and in the absence of such, recourse must be had, for a proper definition, to etymologists of authority. In *Johnson*'s Dictionary, under the word "fence" (definition 2), are found these expletives—"inclosure, ground, hedge, fortified boundary". Now these are all clearly erections upon the surface of the earth, and it is obvious therefore, that the learned lexicographer applied that description to a "fence". He submitted therefore, that the rule must be discharged.

D. F. Jones, in support of the rule, insisted, that the definition suggested was quite irrelevant. Inclosure of the land and exclusion of intruders, are the objects proposed by a fence, and does not a ditch effect those objects as well as any hedge or erection, be it never so high? A dictionary can hardly be considered as an authority in this case, but there is a respectable authority the other way, for *Callis* (*a*), on his

(*a*) Callis, tit. Ditches, 81.

reading on the statute of Sewers, expressly calls a *ditch* a *fence*, and treats them as synonimous terms. The defendant therefore on this issue is clearly entitled to a verdict.

Abbott, C. J.—I was of opinion at the trial, that a ditch of the description proved in this case to have existed, was not a fence within the meaning of the Local Act, nor of the General Inclosure Act. It appeared to me, that the word "fence," which is a general term in the General Inclosure Act, imported something more than a mere ditch, and my opinion appeared to be fortified by the language of the 25th section, which declares "that it shall be lawful for the several proprietors of the allotments, to be made in pursuance of any such act, at any seasonable time or times, within the space of seven years next after the fencing of any allotment or allotments, to set up and erect posts and rails, or other dead fences, on the outside of the ditches bounding their respective allotments, not exceeding three feet from such ditches, for the preservation of their quickset hedges; and at any seasonable time or times, before the expiration of the said term, to take and carry away the materials of such outside fences when they shall think proper." Upon reference to this section, I thought that a mere ditch was not sufficient; but where there was a river, I thought that might be deemed a sufficient fence. That was my opinion at the trial, and I confess my mind is not free from doubt upon the subject at the present moment. My learned Brothers, however, are unanimously of opinion, that a ditch is a fence to satisfy the requisites of this statute. I shall therefore only observe further, that it is much to be regretted that this point has not been settled sooner, because in the course of the last thirty years some hundreds of thousands of pounds might have been saved, which have been expended, if it had been thought sufficient, instead of doing that which has been constantly done, namely, planting quickset hedges, and putting up posts and rails to protect

1822.
ELLIS v. ARNISON

the fences for a certain number of years, merely to dig a ditch, and where there was a pre-existing ditch to have that alone, as part of the fence. But the majority of the Court being of opinion that this is the construction to be put upon the act, the verdict must be entered for the defendant on this issue.

Rule absolute.

Tuesday, Nov. 19.

HART v. TAYLOR.

Where plaintiff declared upon a promissory note, with a count for goods sold and delivered, and laid his venue in *London*, and afterwards delivered a particular, reversing the order of his demands, the Court refused to change the venue to *Lancashire*, on an affidavit that the real cause of action was goods sold and delivered, arising in the latter county, and not elsewhere, the existence of the promissory note not being negatived.

MEREWETHER moved, on the part of the defendant, to change the venue from *London* to *Lancashire*, upon an affidavit, stating that the declaration contained two counts; the first upon a promissory note, and the last for goods sold and delivered; that the bill of particulars reversed the order of the counts, stating that for goods sold and delivered first, and that upon the promissory note last; that the real cause of action was a sale of goods; and that it arose in *Lancashire*, and not elsewhere. Under these circumstances he submitted that this was a proper motion.

BAYLEY, J. (*a*)—The case of *Green* v. *Shepherd* (*b*) is decisive against this application. It was there decided that the Court could not separate the causes of action. If the defendant's affidavit had stated that the promissory note really did not exist, and that the count upon it was inserted merely for the purpose of preventing him from changing the venue, the Court perhaps might have granted this rule; but for all that appears the note does exist, and that being the case, the Court will not restrain the plaintiff from proceeding in the venue he has chosen, on account of another cause of action.

Rule refused.

(*a*) The only Judge in Court.

(*b*) 5 Taunt. 576.

BARKER v. SLATER.

Thursday, Nov. 21.

A prisoner, in execution, at the suit of a creditor, whose debt exceeds 300*l.*, is not liable to be brought up under the compulsory clauses of the Lord's Act, 33 *Geo.* 3. c. 5. to make an assignment of his estate and effects.

ANDREWS, on a former day, obtained a rule nisi for bringing up the defendant, a prisoner, charged in execution for debt, to compel him to make an assignment of his estate and effects for the benefit of his creditors, in pursuance of the compulsive clauses of the Lord's Act, 32 *Geo.* 2. c. 28. ss. 16 & 17, and the 33 *Geo.* 3. c. 5. The application was made at the instance of the plaintiff alone, and the case of *Chappell* v. *Ashley* (*a*) was cited as an authority in principle.

Chitty now shewed cause, and said the answer to this motion was, that the plaintiff's debt amounted to 1700*l.* and upwards, and the operation of the compulsory clauses of the Lord's Act was confined to the case of a prisoner committed or charged in execution for any debt or damages not exceeding 300*l.*, besides costs. It was clear, therefore, that if the debt or damages exceeded 300*l.*, the creditor had no remedy under the compulsive clauses. By no construction of this act would the Court be authorised in exercising the jurisdiction now sought to be interposed. Independently of the express limitation of the statute, nothing could be more unjust in principle, than to allow a creditor to adopt one remedy by charging a prisoner in execution, and confine his body perhaps for twelve months, and then compel him to make an assignment of his estates and effects. The legislature, by 32 *Geo.* 2. c. 28, had limited the jurisdiction of the Court to cases where the debt was only 100*l.*; but by 33 *Geo.* 3. c. 5. it had been extended to 300*l.*; but it was evident that the intention of the legislature was not to carry it any further. If the Court

(*a*) Ante, vol. i. 25.

1822.

BARKER v. SLATER.

could exercise the jurisdiction to the extent urged by this application, it would per saltum repeal the general Insolvent Debtors' Act, and supersede the necessity of any further measure respecting insolvent debtors.

Andrews, contrà, argued upon the principle laid down in *Chappell* v. *Ashley*, that as the chief object of the Lord's Act was to oblige the debtor to do justice to his creditors, he might be brought up to make an assignment of his property, whatever the amount of his debts might be. He had understood that case to go the whole length of saying, that the debtor might be compelled to make satisfaction to his creditors, though the debt exceeded 300*l*. If, contrary to the principle there laid down, the Court were to limit the relief to cases where the debt was 300*l*. only, it would, in a great measure, defeat that liberal construction which the Court was always disposed to give to the Lord's Act in favour of creditors. It was no answer to this application, that having the body of the debtor in execution was a satisfaction of the debt.

ABBOTT, C. J.—The case of *Chappell* v. *Ashley* does not go to the extent which we are required to carry the Lord's Act. The effect of that case is no more than this, namely, that it is competent for any one creditor whose debt does not amount to 300*l*., to avail himself of the 16th and 17th clauses of the act, and to compel the debtor to assign his property whatever may be the whole amount of the debts for which he is charged in execution. We cannot carry the construction of the statute farther than that. It must be limited to the case of a creditor whose debt does not exceed 300*l*. Here the debt is 1700*l*. and upwards.

BAYLEY, J.—I think this rule ought to be discharged with costs. It was moved before me, and I entertained a very strong doubt at the time, whether I ought to grant it, but

being told that *Chappell* v. *Ashley* had decided the very point, I yielded to the application.

1822.



BARKER v. SLATER.

BEST, J.—The Court would gladly make this rule absolute if it had authority, considering the policy of the act.

ABBOTT, C. J.—Upon the whole we think the rule ought to be discharged without costs. The Court does not approve of a man living in prison and refusing to give up his effects which might probably discharge all his debts.

Rule discharged, without Costs.

In the Matter of JOSEPH ADDIS.

Saturday, Nov. 23.



An order of bastardy not made until twelve years after the death of the child, whereby the putative father (who had in the mean time absconded) is adjudged to pay two several sums, one for the bye-gone maintenance, and the other for the costs, is void; and though the filiating Justices commit the father upon an illegal warrant, from which he is discharged at the next Sessions, still they may afterwards issue a fresh warrant, founded on the original order; but if the case falls within 49 *Geo.* 3. c. 68. s. 3. as an order unappealed from, the commitment for non-payment of maintenance must be for three months, unless the money is sooner paid. A *general* commitment until the putative father pays *two several sums*, one for maintenance, and the other for costs, is bad in toto.

BY an order of bastardy, made by two Justices, on the 4th of *April* last, *Joseph Addis* was directed to pay to the parish officers of *Snarestone*, in the county of *Leicester*, two several sums of 8*l.* and 17*l.* 10*s.* the one for the costs attending the lying-in of the mother, and of apprehending and securing himself; and the other for the maintenance of the child from its birth on the 29th *November*, 1808, to its death on the 16th *April*, 1812. In default of paying these several sums the Justices immediately committed him to the county gaol "until those sums should be duly paid, or until he should be otherwise delivered by due course of law." At the last *Easter* Sessions no appeal was entered against the order of filiation, but the Justices at the *Midsummer* Sessions discharged *Addis*, on the ground that the warrant of

1822.

In re ADDIS.

commitment was informal, inasmuch as it directed him to be imprisoned quousque, instead of being for three months, under the 49 *Geo.* 3. c. 68. s. 3. After *Addis* had been thus discharged, he was again apprehended on the 4th of *September* last, and committed to the county gaol by the filiating Justices, under a fresh warrant, founded on the original order of filiation and maintenance. The warrant directed the gaoler "to receive the said *Joseph Addis* into his custody, and commit him to ward, there to remain without bail or mainprize, except he should put in sufficient surety to perform the said order, or else personally appear at the next Quarter Sessions; and also to abide such order as the Justices there assembled should take in that behalf, and if they should take no order, then to abide and perform the order before them." At the last *Michaelmas* Sessions there was no appeal against the order of filiation, and on a second motion to discharge him from the commitment, the Court refused to interfere, because his remedy, if any, was in this Court.

S. M. Phillips, on a former day in this Term, obtained a rule nisi for a habeas corpus, to bring up the body of *Addis* to be discharged out of custody, and he made three points. 1st. That the Justices had no authority to make an order of maintenance for a bye-gone time, the child being dead upwards of twelve years at the time the order was made. 2d. That the second commitment should have been for three months under the 49 *Geo.* 3. c. 68. s. 3, instead of under the 18 *Eliz.* c. 3, s. 2., inasmuch as the order of filiation must be considered as an order unappealed against, by reason of the first commitment, which put it out of the power of *Addis* to appeal, and therefore it became a case within the first-mentioned statute; and, 3d. That this commitment was clearly bad in form, being until the putative father paid two several sums instead of one, the Justices having no power to commit for an indefinite period for non-payment of

maintenance, that power extending only to cases where the putative father refuses to pay the expences of filiation.

When the case came on this day, the first point was given up as untenable (*a*).

G. W. Marriott now shewed cause, and contended, that there was no foundation for the remaining objections. The order of bastardy in this case is made conformably to the 18 *Eliz.* c. 3, and is therefore perfectly good; and the only question is, whether the second warrant of commitment is correct in point of form. It is quite clear that the 49 *Geo.* 3. c. 68, s. 3, has no bearing upon this question, because that clause has reference only to subsequent maintenance under an order of bastardy *already made and confirmed*, but not to enforcing the order in the first instance, under the statute of *Eliz.* c. 3. It is in the event of the putative father refusing, *from time to time*, to obey the order so made and confirmed, that the Justices, for the purpose of enforcing it, are empowered, by the 49 *Geo.* 3. s. 3, to commit the father for three months, or until the maintenance money is paid. Unless, therefore, it can be shewn that this is a case within that statute, the objection falls to the ground. This is clearly not to be considered as an order unappealed against, so as to bring it within that statute. It cannot be said that *Addis* was deprived of his appeal under either the first or the second commitment. Supposing the first commitment to be illegal, still there was nothing to prevent his appealing against the order of filiation. It is clear that the Sessions had no right to discharge him from the first commitment, the order itself being perfectly regular, and no appeal against it; but having discharged him, it was competent for the filiating Justices to commit him again, as they had done under the second

(*a*) See *Regina* v. *Odam*, 1 Salk. 124. *Rex* v. *Fox*, 1 Bott. 5th edit. 477. *Rex* v. *Eve*, Id. 471. *Rex* v. *Moravia*, Id. 492. *Rex* v. *Miles*, Id. 473. *Rex* v. *Hill*, 1 Sid. 326. *Rex* v. *Sweet*, 9 East, 25.

1822.

In re ADDIS.

warrant. Even then he might have appealed to the *Michaelmas* Sessions against the order. *Rex* v. *Hill* (a). But he neglected so to do, and therefore the order was conclusive against him, and he remained committed on that order. This case then being out of the purview of the statute 49 *Geo.* 3, the only remaining question is, whether the commitment is bad in point of form. Supposing this to be a case within the latter statute, and that the commitment should have been for three months instead of for an uncertain time, for not paying the maintenance money, still the commitment would be good quoad the 8*l.* for costs, by force of the 4th section of the 49 *Geo.* 3; and the Court might reject the 17*l.* 10*s.* as surplusage. There is no doubt that the Justices may commit generally for the non-payment of the expences, and therefore, though they had no such power with respect to the maintenance, still the commitment here would be good pro tanto, according to the authority of many decided cases. It would lead to the greatest inconvenience in practice if there were to be two commitments, one for maintenance, and the other for the expences of apprehension, &c.

Phillips, contrà, was stopped by the Court.

ABBOTT, C. J.—The question in this case is, whether a warrant in this form is good. If it is not good, there may be another warrant made out to commit the party for three months, if this is now to be considered as an order unappealed against, which I am inclined to think it is. A defect in the warrant will not vitiate the order, which, in this case appears to be perfectly correct; but the difficulty I have is in saying that the warrant is correct. If there has been a good order made for maintenance, and there has been no appeal against it, then the Justices are to proceed under the

(a) 1 Sid. 326. See *Rex* v. *Messenger*, 1 Bott. 5th edit. 174. and *Rex* v. *Smith*, Bulst. 312.

49 *Geo.* 3. c. 68. s. 3. This is a good order of maintenance, but the Justices have no right to issue their warrant to commit the party for the maintenance, and also for the expences of apprehending, &c. for an indefinite period. The objection to the warrant is, that the party is committed generally, until he pays two different sums, when it should have been a commitment for one only. The commitment under the statute of *Elizabeth*, is only until the next Sessions, in default of the party entering into recognizances, and giving security; but here he is committed not merely for the maintenance-money, but also in respect of the expences of apprehending him, and making the order of filiation, which latter are only given by the 49 *Geo.* 3, in the cases mentioned in the third section. The order may be good, but the commitment is bad, being for two sums, and as the commitment is illegal as to one, it is bad in toto.

Bayley, J.—I am of the same opinion. We cannot hold the commitment to be bad in part, and good as to the rest. The commitment here is until he pays two different sums, whereas it should be until he paid one only. This commitment is bad as to the 17*l*: 10*s*. and therefore it is bad as to the rest. The order, however, being good, it may still be enforced.

Holroyd, J., was of the same opinion (*a*).

Rule absolute.

(*a*) *Best*, J., was absent.

1822.

Saturday, Nov. 23.

The King v. The Bailiffs and Corporation of the Borough of Eye.

The words "shall be lawful," when found in the bye-law of a corporation, are not to be construed as obligatory to do what the law ordains. Therefore where a bye-law of the borough of *Eye* ordained that upon the happening of any vacancy in the number of twenty-four common councilmen, such vacancies should be filled by the freemen inhabiting the town, and that a great court should be holden once every quarter, at which "it should be lawful" for the bailiffs to admit to the freedom of the town such persons as had been resident therein for one whole year:— Held, that this bye-law was only optional, and could not be enforced by mandamus to compel the admission of qualified inhabitants to the freedom of the borough.

SCARLETT (with whom was *H. Cooper*) moved for a rule to shew cause why a mandamus should not issue to the defendants, commanding them to admit *George Twitchett* to the freedom of the borough of *Eye*. The affidavit upon which the motion was founded stated, that the borough of *Eye* is, and has been from time immemorial an ancient borough, and both by prescription and charters, and letters-patent successively granted by *Hen.* 6. *Hen.* 8. *Edw.* 6. *Eliz. Jac.* 1. and 9 *W.* 3. was incorporated under the name and title of "The Bailiffs, Burgesses, and Commonalty of *Eye*;" that it consisted of twelve capital burgesses, out of whom the bailiffs were chosen, twenty-four common councilmen, and an indefinite number of freemen. The charters and letters-patent did not point out who were entitled to be admitted freemen, but in the 8 *Eliz.* the corporation passed a bye law, which ordained, that as often as any vacancies should happen, by death or otherwise, in the number of the twelve capital burgesses, the number remaining should elect others out of the common council of twenty-four, to fill up such vacancies, and that upon the happening of any vacancies in the number of twenty-four common councilmen, such vacancies should be filled by freemen inhabiting within the town, and who had been resident and dwelling therein for the space of one year at least, to be elected by a majority of those remaining of the twenty-four, and that once in every quarter of a year the bailiffs should hold a great Court, for the purpose of granting admission to the freedom of the borough. The bye-law then ran thus:—

"Item, that at every of the said general Courts, *it shall be lawful* for the bailiffs to admit into the freedom of the borough,

town such person or persons as shall be suitors for the same, and withal shall be thought honest and well-disposed men, and being such as are resiant and dwelling within the town of *Eye*, by the space of one whole year at the least, so that the said person or persons so admitted, do take such oath, presently there, at the time of his admittance, as in the book expressed to be taken by him or them, and so that the same freeman do pay there presently for such his admittance to the said bailiffs, or one of them, six shillings, of lawful *English* money, and four-pence for the steward for recording his name and admission."

The affidavit then proceeded to state that *George Twitchett* had been resident and dwelling in the borough of *Eye* for the space of one whole year, on the 27th *October*, 1820, being the day when one of the great courts was held by the bailiffs of the town, and attended the said court, and requested and demanded of the bailiffs to be admitted to the freedom of the borough, by reason of his residency and inhabitancy, and then declared himself ready to take the requisite oaths, and to pay his admission fees; but the bailiffs wholly refused to admit him to his freedom. The affidavit proceeded further to state, that he had carried on the business of a tallow chandler in the borough during a period of six years, and had always been ready to take up his freedom, and comply with all the laws and customs of the borough, and that nevertheless he had not only been refused his freedom, but had been fined and amerced by the courts of view and frank-pledge, held by the bailiffs, and had been twice served with summonses to pay, or shew cause why he should not pay, such fines or amerciaments, for carrying on trade in the town, not being a freeman. Under these circumstances, the question was, whether the bye-law set out in the affidavits was compulsory on the defendants to admit the prosecutor to his freedom. The learned counsel con-

1822.

REX v. EYE.

tended, that the words, "it shall be lawful for the bailiffs to admit," were to be construed as imperative upon the bailiffs to admit any person who was qualified to be a freeman, by residency and inhabitancy, according to the terms of the bye-law. He relied upon *Rex* v. *The Mayor and Jurats of Hastings* (a), as an authority to shew that if there are words of permission in an act of Parliament tending to promote the public benefit, they are always held to be compulsory. If this doctrine applied to an act of Parliament which affected the whole kingdom, there seemed to be no sensible reason why the same principle should not be applied to the bye-law of a corporation, if ordained for the benefit of the public within the local limits. The same reason was applicable in both cases. In this case the bye-law was obviously calculated for the benefit of the inhabitants of the borough of *Eye*. In the first place, no person could carry on trade unless he was a freeman, and in this very case the prosecutor had been fined for carrying on trade without taking up his freedom. But, in the second place, as respected the elective franchise, the bye-law was of the greatest importance, and if not enforced, it would lead to this necessary consequence, that the right of voting for members of Parliament would remain solely in the bailiffs and capital burgesses, instead of being extended to the freemen at large, whose numbers might be limited at the discretion of the bailiffs and burgesses. If then the words "shall be lawful," were to have the same import as they are considered to have in a public act of Parliament, this application could hardly be denied.

ABBOTT, C. J.—It is not our province to decide whether the exclusion of persons from the freedom of this borough be lawful or unlawful, but we are called upon to say whether this old bye-law is to be considered as imperative

(a) Ante, vol. i. page 148.

1822.

REX v. EYE.

upon the bailiffs and corporation of the borough, because it is declared "that it shall be lawful" for them to admit qualified inhabitants to their freedom. It is not suggested that there is any charter of this corporation containing similar words, shewing in what manner the freemen are to be elected, and as recourse has been had to this ancient bye-law, we have a right to suppose that no such charter existed. However, it is said, that we ought to give the same force and effect to this bye-law, as we should give to a public act of Parliament. I am of opinion that we cannot go that length. The words, "it shall be lawful," when they are found in a charter of a corporation, or in a bye-law, evidently import, that those who are to act upon it, are to exercise a discretion, whether they shall choose so to do, or whether it is advisable so to do. These words occur in many charters, with reference to the power of filling up corporate body in case of vacancies, but they do not carry with them the force of an imperative law. I recollect in one case Mr. Justice *Chambre* has said, that whether the words "shall be lawful," are to be expounded imperatively or not, must depend upon the subject-matter to which they apply. I think the words give a discretionary power to the bailiffs to admit to the freedom, and that no absolute right is given to the qualified inhabitants. It can hardly be supposed that the corporation meant to bind themselves imperatively by this bye-law, more especially as these words are not to be found in any of the charters. The practice has always been to construe these words optionally. I think, therefore, we cannot grant this application.

BAYLEY, J.—The words "shall and may be lawful" may be obligatory in an act of Parliament, but it is impossible to say that they are obligatory in a bye-law. The case of *Rex* v. *The Mayor of Hastings*, was an application for a mandamus to hold a court of record for the recovery of

1822.

REX v. EYE.

debts pursuant to the terms of the charter of the corporation, but this case is distinguishable from that.

The rest of the Court concurred.

Rule refused (a).

If a royal charter contains words of permission to do an act which is clearly for the public benefit, they are obligatory; therefore where a charter of *Jac.* 1, granted to the steward and suitors of a manor, *power and authority*, to hold a court for the purpose, (amongst other objects) of hearing and determining pleas of debt, &c. but the court had been disused for that purpose during fifty years:—Held, that mandamus would lie to compel the court to be held again, notwithstanding the non-user for such purpose.

(a) Vide *Drage* v. *Brand*, 2 Wils. 377. *Paull* v. *Rogers*, 5 T. R. 540. *Roles* v. *Rosewell*, Idem. 538. *Woolcot* v. *Goulding*, 8 T. R. 126. In the case of *Rex* v. *The Steward*, &c. *of the Manor of Havering Atte Bower*, Easter Term, 3 *Geo.* 4, an application was made to this Court for a mandamus to the stewards and suitors of the court of the lordship or manor of *Havering Atte Bower*, in the county of *Essex*, to receive the plaint of one *Wood*, against another person named *Butcher*, and to issue process thereon, and to proceed to hear and determine the plaint pursuant to the charter 2 *Jac.* 1. In that case the charter granted to the steward and suitors of the court, belonging to the manor (which was of ancient demesne), *power and authority* to hear and determine, by plaints, to be levied and prosecuted in the court, pleas, debts, accounts, covenants, trespasses, as well by force and arms committed, as otherwise, detention of chattels, and all other contracts whatsoever, within the lordship, &c. made, done, or arising, although the same debts, accounts, &c. amounted to or exceeded forty shillings. It appeared that this charter had been constantly acted upon, the court having been regularly held once in three weeks; but it also appeared from the records, that there had been no plaint for a debt or contract heard and determined since the year 1796. No suit in replevin had been instituted since 1790, and the last instance of a suit in ejectment was in 1803; but for other business, such as for levying fines, and suffering recoveries, respecting lands within the manor, the court had since then been constantly held. In *January* last the prosecutor, *Wood*, had appeared before a court, duly held by the steward and suitors, and demanded to levy a plaint against *Butcher*, for the recovery of a debt under forty shillings, arising within the manor, of which both were tenants. It was contended, in answer to the motion for a mandamus, that as there had been no plaint of this kind levied in the manor court for a period of fifty years, the steward and suitors had now no authority to hold such a court for the recovery of debts, and that the disuse of it was conclusive upon the subject; but,

The Court, referring to the case of *Rex* v. *The Mayor and Jurats of Hastings*, said, that a court of this kind, being established for the public benefit, the words of permission used in the charter, were obligatory, and the right of determining suits of the description mentioned, could not be lost by the disuse relied upon; and therefore the rule was made absolute.

Chitty was for the Crown, and *Gaselee* for the defendants.

1822.

PATERSON *v.* REAY.

Saturday, Nov. 23.

Certiorari will not lie to remove the record of a judgment obtained against a defendant in the county palatine of *Durham*, for the purpose of enabling his bail to render him in this Court, though he be a prisoner for debt in the custody of the marshal.

THE plaintiff had obtained a judgment against the defendant in the County Palatine of *Durham*, and defendant being now a prisoner for debt in the custody of the marshal of this Court,

E. Lawes applied for a certiorari to remove the proceedings against the defendant in that cause, from the Palatine Court into this Court, for the purpose of enabling the bail below to render the defendant in their own discharge. He had no express authority for the motion, but he understood the Court had sometime since expressed an opinion that after judgment, they had power to grant such an application under the 19 *Geo.* 3. c. 70. It was clear that the bail might have rendered the defendant in the county palatine, had he not been confined within the prison of this Court, and there seemed no good reason why the record of the judgment below might not be removed to enable them to render him here.

Per Curiam.—This application is without precedent, and we have no authority to grant it. This would be to take away from the plaintiff below his remedy against the bail, if they should not comply with the terms of their recognizances. The plaintiff may choose to proceed against the goods of the defendant, if he has any in the county palatine. Should he issue a writ of ca. sa. the return will probably be, non est inventus, and then the plaintiff will have his remedy against the bail. It would be an anomaly in the law if we were to enable the defendant or the bail to remove the record in opposition to the wishes of the plaintiff. The statute referred to, was passed in relief of plaintiffs,

1822.

PATERSON v. REAY.

but not of defendants. Unless you can produce an affidavit, that the plaintiff consents to this application, we cannot interfere.

Rule refused.

Saturday, Nov. 23.

The KING v. The MAYOR, &c. of WEST LOOE.

Mandamus will not lie to admit an inhabitant of a borough by prescription to be a free burgess, unless it appear first that he has an inchoate right to be a free burgess, and, second, that the office of free burgess is a corporate office by prescription.

MEREWETHER moved for a rule to shew cause why a mandamus should not issue to the Mayor, Steward, and Free Burgesses of the borough of *West Looe*, in the county of *Cornwall*, and to the Jury at the next Court-leet, commanding them to hear evidence, and to inquire whether *Thomas Rendle* is, and for the last year and upwards has been, an inhabitant of the said borough, and if found so to be, and not to be otherwise disqualified, to present, swear, and admit him to be a free burgess of the said borough.

The motion was founded upon long affidavits, the material facts in which appeared to be the following:—The borough of *West Looe* is an ancient borough by prescription, sending, as well before the charter of *Elizabeth* as after, two members to parliament; the right to elect whom is in the mayor and burgesses. By a charter of *Richard* Earl of *Poictier* and *Cornwall* to *Odo de Treverlen*, his borough of *Portlyan* or *West Looe* was made a free borough, and, amongst other things, the burgesses of the same were to be free and quit of all customs; and if any one should reside for a year and a day in the same borough without just claim, he should, according to the law of other free burgesses, be quit from neifty and servitude. By charter of 16 *Elizabeth* the *inhabitants* were incorporated by the name of "The Mayor and Burgesses;" and it appears by

1822.

REX v. WEST LOOE.

that charter and the records of the borough, that the inhabitants of the borough were the burgesses thereof; but neither the charter nor any surviving bye law contains any provision for the election of burgesses. There is a prescriptive Court-leet in the borough, and a steward thereof, which the charter of *Elizabeth* recognizes and directs to be held before the mayor and steward. Records of the Court in the reign of *Henry* 8. are extant, from which it appears that the Jury presented the defaults of suitors; and by other records of the Court it appears that lists, in which the resiants were inrolled, were made, called over, and presented at the Court, and amerciaments made for defaults. In 1613 one was sworn as an inhabitant, and duly put into the next list of resiants, and afterwards filled offices in the borough which require the previous qualification of being a burgess. The list of resiants was continued down to 1651, when a list of censores, and at other times of freemen, was substituted in its stead. In 1652 eleven persons were presented by the Jury at the Court-leet for not being *freemen*; in 1653 three for dwelling in the town not being *sworn freemen*; and afterwards many others for not being sworn freemen or *townsmen*; and in 1654 one was presented by the Jury, and sworn a freeman. In 1660 the list of resiants was resumed, and that of freemen omitted; and in 1662 the same, and so down to 1678, when, at a Court, held before the mayor aud *four* capital burgesses, three persons were sworn free burgesses, from which time *a list of free burgesses was substituted for the list of resiants*, and the mayor and capital burgesses assumed to themselves the right of nominating, admitting, and swearing free burgesses; and the Courts were very irregularly held, and often altogether omitted, down to 1708, when the Jury presented "that no one ought to be sworn free of the borough unless presented by the Jury," and they then accordingly presented one who was sworn and long acted as a free burgess. In 1710 the Jury presented "all their ancient customs to be

1822.



Rex v. West Looe.

good and laudable, and all who owe suit and service, and have made default;" and they presented five persons as fit to be sworn freemen, and a like number in 1712; but in the middle of the page of the book containing the latter presentments, a piece is cut out. In 1714 the mayor assumed to himself to propose to his brethren persons to be sworn freemen, and continued so to do till 1762, when the mayor for the time being was removed by quo warranto. In 1763 thirty-nine inhabitants were admitted free burgesses, and one free burgess was removed by quo warranto *for not being an inhabitant;* and in 1764 thirty-two burgesses resigned, and several others were removed by quo warranto. No Court-leet was held for many years, but in 1765 a Court-leet was held, and seventy-seven persons resigned as burgesses. At a Court held 22d *October*, 1822, before the mayor and eight capital burgesses, but no steward present, several resiant householders, paying scot and lot, appeared and claimed to be presented, admitted, and sworn free burgesses. They protested against the absence of the steward; but the mayor persisted in proceeding. A written notice of their claim was tendered to the Jury, but by the mayor's direction rejected; and the Jury also, by the mayor's direction, declined to present the claimants. *Thomas Rendle* was one of the persons then claiming to be presented, and rejected. There are now only thirty-two free burgesses of the borough; twenty-two of them live out of the borough; and there are eighty resiant householders in the borough, paying scot and lot, entitled to be made free burgesses, and whom the mayor, steward, burgesses, and jury, arbitrarily refuse to admit.

Upon these facts it was contended, that this being a borough by prescription, whatever the ancient mode of creating burgesses was, the same it must be now. From these affidavits it appeared that free burgesses and resiants were the same; and that the resiants were, in this borough, in

1822.



REX
v.
WEST LOOE.

conformity with the common law, presented, enrolled, called over, and sworn by the Jury at the Court-leet. By the ancient practice of the borough, as well as by the law, it was the duty of every resiant to attend at the Court-leet, and to be enrolled and sworn there, and give his pledges, otherwise he was subject to be imprisoned, and was in effect an outlaw (*a*). It was the practice of the Jury in this borough, and their bounden duty by the law, to present all resiants to be enrolled and sworn, and to give pledges, and if not done, to present any default in any of these respects (*b*). This duty was so imperative that the King could not grant to any man that he should be exempt from this suit (*c*); and consequently no subsequent charter of the crown could have affected this mode of presenting, &c. the free burgesses, so as to exempt any resiant from his obligation to be presented, or the Jury from presenting him; and therefore the Jury should be compelled by mandamus to do their duty in that respect, particularly as there was no other legal mode prescribed for making burgesses in this borough, the proceedings of the mayor and capital burgesses being clearly illegal, not being supportable by the charter of *Elizabeth*, if put upon that ground, and being an usurpation, as indicated by its irregularity. (*Bayley*, J. Surely a free burgess is a corporate officer.) Not ex vi termini; a free burgess is a free inhabitant of a borough; he may in some cases also undoubtedly be a corporator, as he is in this case by the charter of *Elizabeth*, which superadds the corporate character to that of a free burgess presented and inrolled at the Court-leet; a free burgess therefore is not necessarily a corporator, for there are many boroughs which are not corporations. (*Bayley*, J. Then the Court cannot interfere by mandamus. *Abbott*, C. J. A free burgess, under a charter of *Elizabeth*, is certainly a corporator; but he is a corpo-

(*a*) 2 Inst. 72. Com. Dig. tit. Leet. Kitchen, on Court Leets, 66-7.

(*b*) Kitchen, on Court Leets, 12. 19. 103.

(*c*) 2 Rol. 5.

rator without prescriptive right; the Court-leet may be prescriptive, but it does not therefore follow that there is a prescriptive right to admission; and it appears here that there is not. So that this difficulty arises. If a free burgess under this charter is *not* a corporate officer, we cannot interfere by mandamus; if he *is*, still, as he has no prescriptive right of admission to the office, we are equally prevented from interposing. I am not aware of any authority to shew that the Court has ever granted a mandamus in either of these cases.) The free burgesses of this borough are not under the charter of *Elizabeth;* there were free burgesses there three centuries before the date of that charter, which is sufficient evidence of their having existed time out of mind; and the common law, which clearly existed before that period, required every resiant to be inrolled and to take his oath of allegiance before the sheriff, if he was a resiant or inhabitant of the county at large; and before the reeve of the borough, if he was a resiant or inhabitant of a borough. A right and obligation to be inrolled was therefore cast upon every inhabitant of the borough before the time of legal memory, and a free inhabitant of a borough being so inrolled, was thereby admitted a free burgess of the borough. (*Bayley,* J. No; that is not the necessary consequence. The effect of it is merely this, that they become freemen and cease to be considered *vileins.* The residence for a year, as necessary to make a man free, applies only to vileins. There were many other modes of becoming free; and all freemen, whether they became free in that way or otherwise, were bound to be enrolled wherever they were free inhabitants; if in a borough they were free burgesses.) No other mode of admission is prescribed by any charter or bye law of this borough, nor attempted to be put in practice till 1678, when the admission is clearly illegal, being by the mayor and capital burgesses only. The Court then will interfere by mandamus to have the law put in force and justice done, though the matter do not relate to a cor-

porate office. The instances in which writs of mandamus have been granted for corporate offices are very few compared with the other occasions to which they have been applied. He cited *Rex* v. *The Borough of Midhurst* (a), and *Rex* v. *Lord Montacute* (b).

Per Curiam.—The cases cited will not support the present application. In both those cases there was a freehold interest in land, and there was considered to be a prescriptive right in the parties to vote for the election of members of Parliament, and it was upon those grounds that the Court there granted the writ. Those grounds are wanting here; at least the affidavits do not state them; if they did, this case might appear in a very different light before us. The object here is to persuade the Court to order a party to be admitted to an office which is to confer some benefit upon him, without shewing that he has any inchoate title by prescription to fill that office, or receive that benefit. A free burgess in this case is a corporate officer; but he is a corporate officer, without a prescriptive right, and in favour of such a party mandamus will not go. If the other ground is taken, the impediment is equally strong, for if he is not a corporate officer, we cannot interfere in the mode suggested.

Rule refused.

Merewether, the next day, moved for a rule nisi for an information in the nature of a *quo warranto* against the mayor of the same borough, upon affidavits, stating, in addition to some of the former facts, that the mayor is the returning officer of the borough, and that the charter of *Elizabeth* directs that there shall be twelve principal burgesses to assist the mayor, and that the mayor and principal burgesses shall every year name two principal burgesses

(a) 1 Wils. 283. (b) 1 Sir W. Bla. 60.

1822.



REX
v.
WEST LOOE.

before the other inhabitants of the borough, who are to elect one of those two to be mayor for the year ensuing. It appeared that the persons to whom their nomination was given, and by whom the subsequent election was made, were variously named in the corporation books, being sometimes called *burgesses*, and at other times, *common burgesses, freemen, commons, commonalty,* and since 1678, *free burgesses*; all which terms appear from the records of the borough to describe the same class of persons, and to shew that the inhabitants were the freemen, commonalty, or common burgesses; and that at the last election of mayor, the inhabitants tendered their votes, but were rejected. This, he contended, was contrary to the charter; but

The Court said, that the word "inhabitants" in the charter, clearly meant the burgesses, and therefore refused the rule.

Saturday,
Nov. 23.

WEST v. ANDREWS.

An acting guardian of the poor is liable to the penalties of the statute 55 *Geo.* 3. c. 137. s. 6. for supplying the poor of the parish with provisions, though there be no proof of his appointment. If a parish officer is liable to the penalties imposed by 22 *Geo.* 3. c. 83. s. 42, still he may be proceeded against under the general act 55 *Geo.* 3. c. 137, without regard to the former statute. Where the declaration alleged that the defendant was a person having the providing for, ordering, management, control, and direction of the poor of the parish of *W.*, and that he had supplied the poor of the parish with provisions, and it appearing that *W.* was one of five united parishes, whose poor were jointly maintained by all the parishes in one common workhouse.—Held, that the offence was well laid. *Semble,* that the declaration need not have alleged that the provisions were supplied "for the use of the workhouse," in order to bring the case within the statute.

DEBT on the statute 55 *Geo.* 3. c. 137. s. 6. for penalties. The declaration contained sixteen counts. The first count stated, that defendant on the 1st of *June*, 1820, was overseer of the poor of the parish of *Westhampnett*, in the county of *Sussex*, duly appointed in that behalf; and that while he was such overseer, he furnished and supplied in

1822.

WEST
v.
ANDREWS.

his own name and for his own profit, certain goods and provisions for the support and maintenance of the poor of the said parish. The second count described him as collector of the rates of the parish; the third, as a person having the providing for, ordering, management, control, and direction of the poor of the parish; the fourth, fifth, and sixth counts, were framed upon the three first, with slight variations; there were then two setts of counts charging the defendant with supplying goods for the workhouse of the parish; and the remaining four charged him as a person, amongst others, in whose hands the providing for, &c. the poor of five united parishes was placed, *Westhampnett* being one, and supplying the goods in question. Plea, not guilty, and issue thereon. At the trial before *Wood*, B. at the last *Lent* Assizes for the county of *Sussex*, it appeared that the defendant acted as one of the guardians of the poor during the year 1820, but there was no evidence of his appointment to the office, and objection being taken that his appointment should have been produced, it was overruled. The poor-house was under the control of the guardian of the united parishes, but was managed by one *Griffiths*, who was appointed by, and received directions from them, and who supplied the provisions at a certain rate per head. In the year 1820, he purchased some ewe sheep of the defendant for the use of the poor-house and of himself, and paid him for them. It was then objected for the defendant, that this evidence was insufficient to support the declaration, but the learned Judge thought the evidence was such as brought the defendant within the statute, and the plaintiff had a verdict, by his own election, upon the third count only.

Marryatt, in *Easter* Term, obtained a rule to shew cause why the verdict should not be set aside, and a new trial granted.

1822.

WEST v. ANDREWS.

Gurney and *Long* now appeared to shew cause, but were stopt by the Court, who called upon

Marryatt and *Courthope* in support of the rule. As the plaintiff has elected to enter the verdict upon the third count only, the argument in this case may be confined to that count. There are several objections to it. First, the statute upon which this action is brought is not applicable to the case. The parish in question, is one of several united parishes under one and the same management, having one joint poor-house, and therefore all offences connected with the poor, are properly punishable under the former statute 22 *Geo.* 3. c. 83. s. 42. the penalty in which is only 20*l*. But second, the defendant is described as "a person in whose hands the providing for, ordering, management, control, and direction of the poor of the said parish is placed", which is a misdescription of him in two particulars, for, as guardian only, he has no share in the provision, management, or control of the poor at all; they are in the hands of the overseers; the guardians have only to superintend the conduct of those who have the management of the poor; they have nothing to do with the poor themselves; and if the defendant has any share in the management of the poor, still it is not of the poor "of the said parish," for the poor of that parish are managed jointly with those of four others. Then, third, to bring the case within this statute, it should at all events have been alleged, that the provisions were supplied for "the use of the workhouse," and not for the use of the poor of the parish; the object of the sixth section of the statute being, to prohibit the churchwarden, &c. from supplying provisions "for the use of any workhouse or workhouses." On these grounds the defendant is entitled to a new trial.

ABBOTT, C. J.—According to what took place at the trial of this cause, if there is any one count in the declara-

tion sustained by the evidence, the plaintiff is entitled to retain his verdict, and I think we ought not to yield to any objection in point of form, not made before the learned Judge. One objection is, that the defendant is not properly described in the declaration. In some counts he is described as a person having the providing for, management, &c. of the poor of the particular parish of *Westhampnett* by name. If that description of him is sustained by the evidence, the objection fails. I take it, that where parishes are united under 22 *Geo.* 3. c. 83. guardians are to be appointed for each parish, who are constituted overseers of the poor of the particular parish for which they are appointed, and have many exclusive duties to perform respecting their own parish, but also for several purposes become guardians of the united parishes; and therefore, that as regards their own particular parish, their office is several, but, as respects the united parishes, it is joint. That being so, I am of opinion that this defendant must be considered as a person having the management, control, and direction of the poor of that parish for which he is appointed. Though the declaration may contain one or more words descriptive of the duties of the defendant, which are not sustained by the evidence, yet I think such an objection ought not to prevail, it being sufficient, in my opinion, that the allegation should in substance be made out. Another objection taken is, that *all* the counts of the declaration charge the defendant with having supplied these provisions for the maintenance of the poor of the parish of *Westhampnett* generally, whereas, according to the evidence, they were supplied, not for the maintenance of the poor of this parish, but for the supply *of the workhouse* in which the poor of the united parishes are maintained. And then it is contended, that as the statute contains two particular classes of cases to which it is to apply, namely, where the provisions are supplied "for the use of any *workhouse* or *otherwise*," and as these sheep were sold to be used *in the workhouse*, those counts of the declaration

1822.
WEST
v.
ANDREWS.

which allege them to have been sold for the maintenance of the poor *of the parish*, are not proved, because the allegation ought to have been that they were supplied for the use of the *workhouse*. This objection was not taken at nisi prius, but if it had been taken, I am by no means satisfied that it ought to have prevailed, because the language of the sixth section is "for the use of any workhouse or workhouses, or *otherwise*, for the support and maintenance of the poor." Now, to supply provisions for the use of the workhouse, is one mode of supplying for the support and maintenance of the poor. I am not satisfied that this objection ought to prevail, but not having been made at the trial, I think it ought not to prevail now. It is of great importance that these objections in point of form, which are often taken contrary to the justice of the case, should be presented distinctly to the Judge at the trial, for if tenable, then great expence to the parties would be saved. This is an objection of form and not of substance, and I think we ought not to give effect to it, especially where it is a matter of so much doubt. I think this rule ought to be discharged.

BAYLEY, J.—I am of the same opinion. The 55 *Geo.* 3. c. 137. was intended, as it seems to me, to establish one general provision throughout the kingdom, in cases of this description, and that it was not the intention of the legislature that there should be one rule under the 22 *Geo.* 3. c. 83. as to those parishes which were united under that act, and another rule as to those parishes not so united. There is a provision in the latter statute under which this case might have fallen, provided the 55 *Geo.* 3. had not been passed; but that would have been a provision local in its nature, and only applicable to particular places; but in the general provision which was afterwards made by the 55 *Geo.* 3. there is no exception, as to those places comprehended in Mr. *Gilbert's* Act. I do not think it was the intention of the legisture to except those cases which were previously made liable

1822.



WEST v. ANDREWS.

to penalties under the provision of the 22 *Geo.* 3. I can see no reason for such an exception; nor can I comprehend why a provision should be made as to one description of poor-house, different from that applicable to another, if they are both of the same nature. There being no exception in the 55 *Geo.* 3. and the provision being general, I think we are bound to consider this case as coming within the operation of that statute. With respect to those persons who are guardians of the poor under the 22 *Geo.* 3. and, who have the order, management, control, and direction of the poor of the parish in which they are appointed; it seems to me, that they fall most strictly under the provisions and are within the range of those mischiefs, which the 55 *Geo.* 3. was intended to remedy. They have the power of appointing the person who is to provide for the poor, and make contracts for the diet and clothing of the paupers in the workhouse. That person is placed under the strict inspection and control of the overseer, guardians, and governors of the poor. Why then each guardian has a distinct duty to perform. He is carefully and strictly to see that the diet supplied for the poor is good and wholesome; but all that strict care and inspection, will be liable to be superseded, if the person who is to make the inspection, is also to supply the articles which the poor are to eat. I think therefore, that this case comes clearly within the mischiefs which the statute intended to remedy. As to the objection that the declaration in this case, ought to have described this as a supply "for the workhouse," and not for the poor of the parish, I think it is not tenable. If the poor of this particular parish are maintained in a workhouse which is common to the united parishes, still this would be a supply for the poor of the particular parish. But whether the poor are supplied in the workhouse or out of it, seems to me to be quite immaterial for the purpose of this case. It is said that this is not a supply for the poor of this specific parish, because it is united with other parishes. This is a very fallacious ar-

1822.

WEST v. ANDREWS.

gument, for if I supply provisions for *A. B.* and *C.* and they dine jointly together, I supply each and every of them individually. It seems to me therefore, that none of the objections in this case, are well founded.

HOLROYD, J.—I am also of the same opinion. I think it quite clear that the *55 Geo. 3.* being a general law, is sufficient to comprehend the cases to which Mr. *Gilbert's* Act applies; and I am of opinion that this case is clearly within the words as well as the spirit and meaning of the general act. As to the objection that the defendant in this case had not "the providing for, ordering, management, control and direction of the poor" of *this parish,* I think he had such a control as brings him within the operation of the act, and at all events within the alternative part of the sixth section. But it is said, that inasmuch as he was guardian of the poor of the *united parishes,* he is not properly described in the declaration as being the guardian of this parish, because his duty was not confined to this particular parish only. It is contended, therefore, that the allegation in the declaration that he was guardian of the poor of this particular parish is not proved. I however am of a different opinion. I take this declaration to be drawn consistently with sound rules of pleading. It is an established rule of pleading, that it is not necessary to make the allegation to the full extent to which the proof will go. Suppose, in the case of a prescription for a right of common for sheep, and the proof is of a right *for all sorts of commonable cattle*; it has been expressly held, that the allegation is made out, and that it is not necessary to make the allegation co-extensive with the right. This applies directly to the principle of this case. But there is no occasion to resort to any rules of law upon the subject, for it seems to be perfectly clear, that if it was the duty of the defendant as guardian, to superintend the maintenance of the poor of the united parishes, the allegation that he had the control and

superintendance of the poor of the particular parish is sufficient to sustain this action. As to the other objection, that it is not alleged that the supply was for the *workhouse*, but for the poor generally, I am by no means satisfied that it would have been a good objection if taken at the trial; but not having been taken then, I think we ought not to give any weight to it now, conceiving, as I do, that the most mischievous and unjust consequences would result if parties were allowed to keep back objections in point of form, and after taking the chance at the trial upon the merits, then bring them forward after the merits are found against them. I therefore think that this verdict ought not to be disturbed.

Best, J.—Objections in point of form are not at any time entitled to much encouragement, but certainly not after trial, and for this obvious reason, that if they are taken at the trial, they may be immediately answered by facts, perhaps within the power of the other party to give in evidence. The first objection taken in this case at the trial was, that the defendant was a guardian of the poor of five parishes, and therefore that the declaration was insufficient; but the answer to that was, that he acted in the management of the poor of the particular parish mentioned in the declaration; and I think that was a sufficient answer in point of fact so as to remove the objection. The next objection taken was, that it was necessary to prove the defendant's appointment as a guardian. That I think was not necessary. It was sufficient to prove him acting in the character of guardian; for it has been decided, that if a man is charged with doing a particular thing whilst he is cloathed with a particular character, if he acts in that character the Court will presume that he is legally appointed. That was laid down by Mr. Justice *Buller* in the case of a Custom-house officer. If a man acts in the character of rector or vicar of a parish, is it necessary to prove his induction and institution? Until the contrary is shewn it is sufficient to prove,

1822.

WEST v. ANDREWS.

that the party acts in the character to justify the Court in presuming that he is properly appointed. In this case I think it was no objection that this defendant was employed in the management of the poor of five united parishes; for if he was employed in the management of them all, he was employed for every one, and therefore the declaration properly describes him as the guardian of the particular parish. There are many parishes in *London* which are united, but still they exist as separate parishes for all purposes except that which relates to the management of the poor under Mr. *Gilbert*'s Act. The parish of *Westhampnett*, though it is united with other parishes under that statute, still may be described as a separate parish, and therefore a man who acts for the five united parishes, may be said to act for each of the five. Then it is said that this defendant ought to have been proceeded against under Mr. *Gilbert*'s Act, because these parishes are united. That by no means follows. It appears to me that it would have been a most extraordinary circumstance, if, when the legislature passed the 55 *Geo.* 3, and thought fit to make a general regulation applicable to every person who had the management of the poor of any parish, and subjected him to a penalty of 100*l.* for selling provisions to the poor, they should have exempted united parishes (where there is a much greater latitude for abuses of this kind) from the operation of the statute. It appears to me to be impossible to shew that such was the intention of the legislature. This statute imposes cumulative penalties, but whether the defendant be still liable under Mr. *Gilbert*'s Act, it is not for us to decide. It is sufficient for us to say, that this statute is manifestly applicable to every description of parish, whether the parish maintains its own poor separately, or is united with any other parish. I am of opinion that this case is clearly within the statute upon which the action is founded.

Rule discharged (*a*).

(*a*) Vide 3 Barn. & Ald. 145. 5 Ibid. 328. 2 J. B. Moore, 187. Ante, Vol. i. p. 397.

PRIMROSE *v.* GIBSON.

Monday, Nov. 25.

A *fi. fa.* and a *ca. sa.* may issue at the same time against the goods, and the person of a defendant.

THE question in this case was, whether a *ca. sa.* against the person, and a *fi. fa.* against the goods of the defendant, might both issue at the same time. It appeared that the sheriff's officer, having both writs delivered to him, went to the defendant's house for the purpose of taking him in execution on the *ca. sa.*, and, not being able to find him, took his goods in execution under the *fi. fa.*; and on shewing cause against a rule for setting aside the execution for this alleged irregularity,

The Court said, there was nothing irregular in the proceedings, both writs might run together, and therefore

Discharged the rule, with Costs.

Campbell for the plaintiff, and *Chitty* for the defendant.

CAILA *v.* ELGOOD.

Tuesday, Nov. 26.

A sum of money directed to be paid by *A.* to *B.* by the award of an arbitrator cannot be attached in *A.*'s hands by process out of the Sheriff's Court of the city of *London*, at the suit of a creditor of *B.*; therefore where a rule nisi had been obtained against *A.* in this Court for contempt, in not paying money pursuant to an award:—Held, that it was no ground for opposing a rule for attachment, that by the process of the Sheriff's Court the money was attached in his hands to answer the debt of *B.*'s creditors.

ON shewing cause against a rule for setting aside an attachment against the plaintiff, for not paying money pursuant to an award, it appeared, that after the arbitrator had published his award, the plaintiff was proceeding to the chambers of the attorney of the other party to the reference, for the purpose of paying over the money, but, on his way thither, he was served with an attachment out of

1822.
CAILA
v.
ELGOOLD.

the Sheriff's Court of the city of *London*, by which the sum of money thus awarded was attached in his hands, to answer the debt of a third person. Notwithstanding this proceeding the plaintiff was attached for not performing the award, and the question was, whether the foreign attachment was a sufficient ground for setting aside the attachment of contempt?

Chitty shewed cause against the rule, and contended, that the plaintiff was still liable to be attached. It is clear that where money is adjudged by a superior Court to be due from *A.* to *B.*, it could not be attached by a foreign court. Such mode of proceeding, if allowed, would render the judgment of a superior Court absolutely nugatory. Is there any thing in the award of an arbitrator which distinguishes it from the ordinary judgment of this Court? Certainly not. The arbitrator is substituted in the place of the Judge and Jury, and his award is of as much force as the judgment of the Court. In *Coppell* v. *Smith* (*a*) it was expressly decided, that if a sum of money is directed to be paid by *A.* to *B.* by the Master's allocatur, it cannot be attached in *A.*'s hands by process out of the Sheriff's Court in an action against *B.* That case, by parity of reason, is precisely in point; for the award of an arbitrator, who is also an officer of the Court, is of the same force, at least, as the allocatur of the Master. Besides which, in this case, there is an affidavit that this attachment out of the Sheriff's Court was obtained by collusion between the parties.

Holt, contrà.—The plaintiff in this case has been guilty of no contempt, and therefore he is not liable to an attachment. It is true that the money awarded was due, and the plaintiff was prepared to pay it. For that purpose he

(*a*) 4 T. R. 312.

went to the other party, and almost in the very act of paying it, he is served with a foreign attachment, and the payment is suspended. Under these circumstances it would be extremely hard upon the plaintiff to say, that he was liable to an attachment* from this Court for a contempt for not paying the money, when he is prevented from doing so by the act of a Court of competent jurisdiction. There is no doubt that a creditor may attach the money of his debtor in the hands of a banker or other stranger; and what is there to take this case out of that general rule? This is money of a debtor in the hands of the plaintiff, who, as respects the creditor, is to him a stranger. The party who claims the money is not concluded by the foreign attachment; he may put in bail and defend it in the Court out of which it issues, and then that Court will determine whether the money be due or not; but the plaintiff in this case has no such remedy. If the plaintiff is to be held in contempt under these circumstances, he may be compelled to pay the money twice; first, under the foreign attachment; and, second, under the process of this Court by attachment for contempt. The Court will not enter into the question whether the foreign attachment issued in consequence of any supposed collusion between the parties, but will decide the point upon the validity of the proceeding in point of law.

Per Curiam.—We certainly shall not go into the question of collusion, nor decide upon the merits of the case. The result of all the decisions upon the point now raised is, that a judgment of this Court cannot be defeated by any intermediate step of this kind. A judgment of this Court cannot be affected by the process of the Sheriff's Court. Now an arbitrator is an officer of this Court; he is substituted in the place of the Judge and Jury, and his decision is founded upon a submission to arbitration, which has been made a rule of Court, and therefore it is in effect the

1822.

CAILA v. ELGOOD.

same as if judgment had been pronounced upon the case by the Court itself. If the plaintiff pays the money under the attachment for contempt, that will be an answer to the proceedings in the Sheriff's Court. We think the case of *Coppell* v. *Smith* is directly in point, and therefore the rule for setting aside the attachment for contempt must be discharged; but let the attachment lie in the office for a week.

Rule discharged.

Tuesday, Nov. 26.

Where the agent employed in endeavouring to carry through Parliament a bill for making a railway, sued the chairman of a committee of subscribers to the undertaking, for his work and labour, and expences incurred as such agent, and it appeared that the agent himself was a subscriber to the undertaking: Held, that the action would not lie.

HOLMES v. HIGGINS.

THIS was an action for work and labour, and for money laid out and expended by the plaintiff, as surveyor to a company formed for making a railway from *Womersley* to the river *Dun*, in the county of *York*. The defendant pleaded non assumpsit; and by an order of nisi prius the cause was referred to the arbitration of a gentleman at the bar. The arbitrator awarded to the plaintiff the sum of 324*l*. 15*s*., but certified that it was proved before him "that the plaintiff and the defendant were subscribers to and shareholders in the undertaking, for the benefit of which the work and labour was performed, and the expences incurred by the plaintiff, which formed his demand in this action." It appeared that the defendant had acted as chairman of several committees of subscribers and shareholders, assembled for the purpose of carrying the intended railway into effect, and that the plaintiff had selected him as the person responsible for the work and labour, and expences incurred in endeavouring to carry the bill through parliament. The bill had been opposed, and in consequence of non-compliance with some of the standing orders of the House of Commons, the measure was withdrawn.

On shewing cause against a rule for setting aside the award of the arbitrator, the question was, whether, as the plaintiff and the defendant were both subscribers to and shareholders in the undertaking, for the benefit of which the work and labour was performed, and the expences in question by the plaintiff incurred, this action could be maintained.

After hearing *Brougham* for the plaintiff, and *F. Pollock* for the defendant,

ABBOTT, C. J. said—I am quite satisfied that this action is not maintainable. If a number of persons associate together for the purpose of carrying on some undertaking for their joint benefit, and any one of them is employed as surveyor or agent for the purpose of carrying the object in view into effect, the question is, whether that person does not stand in the situation of one, who himself is to be considered as an employer, and liable to contribute to the expence of his own employment? I think he is; and on that ground I think this action cannot be maintained. This action is brought against a person who was chairman of such an association, and it is said that he is the proper person to select. If he had given any personal undertaking to pay the expences incurred by the plaintiff, that might entail a liability upon him. No such circumstance appears in this case, and consequently I think he is not liable in this action. It would be well for those employed as solicitors or agents, on occasions of this kind, to say to the chairman, "Sir, if I am to be engaged in this work, I shall look to you for remuneration, and I desire you to give me some security for my remuneration before I proceed." If the chairman of a meeting, such as this has been described to have been, chose, after such a notice, to act any longer, he would act at his peril; but as no such circumstance appears in this case, I am of opinion that the plaintiff, who is a subscriber to this undertaking, cannot maintain his action

1822.

HOLMES v. HIGGINS.

against a co-subscriber, in the absence of an express or implied undertaking to pay his expences.

BAYLEY, J.—I am of the same opinion. Suppose an action were brought by the plaintiff against all the subscribers, would they not be entitled to plead in abatement that the plaintiff was himself a co-subscriber to the same undertaking? I think it is clear that the plaintiff being himself a subscriber could not maintain an action against his co-subscribers.

The rest of the Court concurred.

Rule absolute, for setting aside the award.



LEE v. SHORE and Another.

Tuesday, Nov. 26.

A. is let into possession of the refuse spar, produced from a lead mine, situate in land demised to *B.*, a farmer (as tenant from year to year), and pays an annual rent for the spar to *B.*'s landlord, and exercises dominion over it by disposing of it as his property; *C.* from time to time, enters upon the land, and carries away portions of the spar, and *A.* brings assumpsit for the value of the spar so taken away: After verdict by the Jury, finding that *B.* the tenant of the land, has an interest in the spar, and has not surrendered it to his landlord:—Held, that the landlord cannot convey such a title to *A.* as will enable the latter, (supposing his possession is clearly established) to waive the tortious taking, and bring assumpsit for the value of the spar, in the absence of an express contract of sale, though the tenant has never disturbed his possession.

Where a defendant on two successive trials of the same cause of action had obtained a verdict, the Court set aside the last verdict, and entered a nonsuit, in order that the plaintiff, who claimed title to property which savoured of the realty, might not be for ever concluded from agitating his right.

ASSUMPSIT for goods sold and delivered, with the common money counts. Plea, non assumpsit and issue thereon. This was the second trial of the same cause of action. The first trial took place before *Richards*, C. B. at the *Summer* Assizes for *Derbyshire*, 1821, when a verdict was found for the defendant. In the following Term



the plaintiff obtained a rule for a new trial, on the ground that the verdict was against evidence, and at the last *Lent* Assizes for the same county, before *Best*, J. the defendant again had a verdict. In *Easter* Term the plaintiff obtained a rule nisi for a new trial, on the ground of misdirection on the part of the learned Judge; and now, on shewing cause, the case was this:—

The object of the action was to recover a sum of 23*l.* 12*s.*, being the value of a quantity of spar (the refuse of ore taken from a lead mine) carried away by the defendants from time to time, between the years 1814 and 1817. It appeared that the land from which the spar was taken was let by the Rev. Mr. *Hurd* some years since to a farmer named *Luke Bond*, as tenant from year to year. In the outset of the case the plaintiff rested his title to maintain this action upon a written agreement, between him and the owner of the land, by which it was alleged, that the latter had granted to him for a certain term, and for certain consideration therein specified, all the spar deposited on the quarter cord (the portion of land round the shaft of the mine allotted for the purpose of mining operations) after the mineral should be extracted; but this agreement not being produced, recourse was had to evidence of enjoyment; and it was accordingly proved that the plaintiff had from time to time, during a period of three or four years, exercised a dominion over the spar so deposited, and had paid rent at the rate of 20*s.* per annum to the ground landlord. There was no evidence of any sale to the defendants; but it was proved that they had entered upon the land and carried away the spar which was the subject of this action, without the consent of the plaintiff, who now brought assumpsit for goods sold and delivered. It was objected on the part of the defendant, 1. That before the plaintiff could recover, he must, at all events, produce the written agreement under which he derived title to the spar in question; for, in the

1822.

LEE v. SHORE.

absence of that, his ground of action completely failed; 2. That primâ facie the spar was the property of the tenant of the land, who had at least an interest in it, and could not be disposed of by the landlord to a stranger, unless it should appear that by the terms of the demise to the tenant the spar was expressly reserved, together with a right of entry upon the land to carry it away; 3. That there was no privity of contract between the plaintiff and the defendant to entitle him to maintain assumpsit for goods sold and delivered; and, 4. That supposing the plaintiff had such a possession of the spot whereon the spar was deposited, as would entitle him to maintain trespass against a wrongdoer for taking a portion of the spar without his leave and licence, still he could not waive the tort and bring assumpsit, unless it appeared that he had the indisputable title to, as well as the possession of, the property. It appeared in the course of the trial, that the practice in the mining districts of *Derbyshire* was for the tenant of the surface of the soil to take such portions of the refuse spar from the quarter cord of the mine, as he thought necessary for the purpose of making walks and mending roads on the farm; and in this instance it was said that the tenant had taken portions of spar for such purposes. An attempt had been made on the part of the defendant to establish a custom for the working miners to take, as their own perquisite, the refuse spar after the mineral had been extracted, but in the result the custom so set up was negatived by the Jury. The learned Judge told the Jury, that in order to entitle the plaintiff to recover in this action, he must make out a clear and indisputable title to the spar produced from the mine. In the absence of the written agreement, under which the plaintiff derived title (and there being no proof of any contract of sale by the plaintiff to the defendant of the spar in question), they would have to say, first, whether the plaintiff had any title whatever to enable him to maintain this action; and, second, whether there was any thing

1822.



LEE v. SHORE.

in the case from which a contract of sale might be implied. As to the first question it appeared from the evidence, that the tenant of the land had been accustomed to take such portions of the refuse spar as he thought proper for his own use. A preliminary question for the Jury therefore was, whether the tenant had in this instance surrendered to his landlord all his own interest in the spar; for if he had not, it was quite clear in point of law, that without the consent of the former, the latter could not dispose of the spar to a stranger; and consequently this plaintiff could have no title which would enable him to maintain an action for goods sold and delivered. The mere possession, and such acts of ownership as had been proved in the plaintiff, would not entitle him to bring this form of action, unless he had a clear title to the property; for though possession would authorize a man in bringing trespass or trover against a wrongdoer, still he could not waive the tort and bring an action ex contractu, unless he had the title. If the Jury should be of opinion that the plaintiff had no title, and that the tenant had not given up his interest in the spar, then the question whether there was any privity of contract between the plaintiff and the defendant would fall to the ground. The Jury, after long consideration, found their verdict for the defendant; expressly stating that the refuse spar belonged to the landlord (thereby negativing the custom for the working miners to take it), but that the tenant had not given up his right to use the spar for such purposes, connected with his farm, as he thought proper. After the learned Judge had read his report, he said he thought at the trial, as he thought now, that he ought to have nonsuited the plaintiff.

Denman, C. S. (with whom was *N. G. Clarke*, jun.) shewed cause against the rule, and contended that the question was now concluded by the finding of the Jury upon the fact of title or no title. As the plaintiff had allowed

1822.

LEE v. SHORE.

the case to go to the Jury in the manner reported by the learned Judge, he had no right to complain if the Jury found their verdict against him. The utmost which the Court could do was to grant a new trial upon payment of costs, inasmuch as the defendant was now in possession of the verdict found by the Jury upon the whole merits of the cause. Could the Court say, in the absence of the written agreement under which the plaintiff claimed to have title to this property, that there was any privity of contract between him and the defendant, so as to entitle him to maintain assumpsit? If not, this verdict could not be disturbed. Upon this point the plaintiff's case entirely depended; for without proof of a clear title it was impossible this form of action could be maintained.

The Court stopt him, and called upon

N. G. Clarke, sen., and *Reader*, to support the rule. This case having been moved on the ground of a misdirection, on the part of the learned Judge who tried the cause, the plaintiff is entitled to a new trial without costs, if the Court should be of opinion that the verdict is wrong. The misdirection complained of is, that the learned Judge told the Jury, the question for their consideration was, whether the tenant of the land had given up his right to the spar forming the refuse of the mine in question. Now that question had nothing whatever to do with this case. The question was, whether the plaintiff had the possession of the spar so as to constitute him the visible owner and proprietor of it; and upon that question there was no doubt whatever. The Jury, by their verdict, negatived the custom set up for the working miners to take the refuse spar, and expressly found that it was the property of the owner of the soil. If so, it is clear that the owner of the soil had a right to dispose of it to whom he pleased. To whom did he dispose of it? Why, to the plaintiff. How is that evidenced?

1822.

LEE
v.
SHORE.

Why it is proved that the plaintiff has the possession of it for four years; pays 20s. a year rent for it; deals with it as his own; and makes a profit of it by selling it from time to time to different persons. There was no doubt at the trial that the defendant had taken the spar in question, and that he ought to pay somebody for it. To whom was he primarily liable for the value? Why, to the plaintiff, who had the possession and apparent ownership. Can it be doubted that in this case the plaintiff had such possession as would have enabled him to maintain trespass for disturbing his possession? If not, what is there to prevent his waiving the tort and bringing assumpsit against a person who has dispossessed him of part of his property? Supposing it to have been properly left to the Jury, whether the tenant of the land had or had not surrendered his interest, still, if the tenant acquiesced in the plaintiff's possession, and never disturbed his right, the presumption of law is, that the plaintiff had an indisputable title. The conduct of all the parties is sufficient to shew that the tenant had waived all right to this spar. It is clear that the plaintiff had such a possession and apparent ownership in the property as entitles him to maintain this action. At the trial it was insisted on the part of the plaintiff, that the tenant had no right whatever to this spar, and could not have disposed of it. He was tenant of the land, and was only entitled to the crops, and he clearly could not take spar which was part of the soil itself. The tenant was merely occupier for agricultural purposes, and could not take parcel of the land. Supposing, however, that he might have prevented his landlord from coming upon the land, unless the latter had reserved a right of entry to take the spar, still it would be no answer in the mouth of the tenant, to say to the purchaser of the spar (as the plaintiff in this instance must be considered to be) that the landlord had no right to dispose of it in the manner stated. If a landlord lets land to a tenant without reserving the right to

1822.

LEE
v.
SHORE.

come on the land to cut down trees, and he does come upon the land without licence, and cuts down a tree, and afterwards sells it to a purchaser, it is no answer to the purchaser to say that the landlord had no right to sell. The tenant might bring an action of trespass against his landlord, but he would have no right to impeach the title of the purchaser of the tree after it was severed; but assuming the case to have been properly left to the Jury, whether the tenant had or had not parted with his interest in this spar, it is submitted, that as the tenant had claimed no right himself, had made no objection to his landlord's authority to dispose of the spar, and had for so long a time acquiesced in the plaintiff's possession, all question relating to the tenant is at an end. The question here is, whether the defendant is to pay a person who has no interest in the spar, or a man who has the possession, has paid rent for it, and dealt with it as his own property?

ABBOTT, C. J.—This being an action of assumpsit for goods sold and delivered, it necessarily proceeds upon the notion that there is a contract, express or implied, between the parties. As to any express contract between the parties, there is none; and the question is, whether any can be inferred. Now, the utmost effect that can be given to the evidence produced, as to the manner in which the spar was removed, is to infer a contract on the part of the defendant to pay the value of the spar to the person who should ultimately be found entitled to receive it. That is the most favourable way of putting the case for the plaintiff. So treating it, did the plaintiff shew a clear and indisputable right to the spar? for unless he did, he cannot support this action. He himself was not the owner of the land, nor of the mine. Had he been the owner of either, his case would have stood much more favourably than it does at present; but he claims title under the person who is the owner, and his title is to be evidenced by a written agreement entered

into with that person, but that agreement is not produced. Can we then say that he has made out a clear and indisputable title, when the title depends upon some written instrument which has not been given in evidence? I think we cannot; and therefore I am of opinion that the plaintiff has failed in making out his case; but, inasmuch as the verdict for the defendant would conclude the plaintiff for ever, if suffered to stand, we think that the verdict for the defendant should be set aside, and a nonsuit entered. If we were to grant a new trial, it could only be upon payment of costs. The utmost we can do is to order a nonsuit to be entered.

HOLROYD, J. (a)—I am of the same opinion. If the plaintiff can on a future occasion produce legal evidence of his title to this spar, he will have an opportunity of doing so, by bringing a fresh action, which he would not have a right to do, if we were to suffer the present verdict to stand, because he would then be shut out for ever. On the present occasion, I do not think the plaintiff made out his case upon such evidence as would entitle him to recover. Something has been said respecting the plaintiff's possession of the spar, and the acts of enjoyment proved as being sufficient to entitle him to bring an action of trespass against any person who took it away without his leave and licence; but I think there is no such evidence of possession in this case, as can bear out that argument. In trespass it is in general sufficient only to prove possession, to sustain the action against the wrong-doer, but a distinction was taken in a case from *Carlisle*, where, instead of bringing an action of trespass, the party brought ejectment; and there it was held, that the plaintiff must shew not only possession but right. In this case there was no evidence of contract. If there had been a contract entered into between these parties, there probably would have been no occasion for the plaintiff to produce the written evidence of his title, to en-

(a) *Bayley*, J. was absent.

1822.
LEE v. SHORE.

able him to recover the value of the spar; but here we have nothing but the simple fact of the defendant taking the spar away without any privity between him and the plaintiff. Then all that the plaintiff shews as evidence of title consists in certain acts of enjoyment, but whether his enjoyment was exclusive, so as to include all the spar produced from the mine, does not appear. Whether he had a right to take it all away, remains in doubt. It does appear that his right, whatever it is, arises under a written agreement, not produced in evidence. Therefore, evidence of partial enjoyment, unless the plaintiff has the right of possession as well as the title, is not sufficient to enable him to maintain the present action, as for goods sold and delivered. Allowing that a man may waive a tort and bring assumpsit, and allowing it to be unquestionable, that taking away the spar in the tortious manner stated in this case, could be treated as a sale; still the question is, whether the mere possession without any evidence of title in the plaintiff, gives him the right of bringing this form of action? The only ground upon which we can infer a contract of sale in this case, in the absence of an express contract, is, that the defendant, in taking the spar in the manner stated, subjected himself to the liability of paying the person who was legally entitled to make a demand of the value. What evidence then, is there, of the plaintiff's title to maintain this action? He claims title by virtue of a written agreement with the owner of the land, but that agreement is not produced. In the absence of that document, we cannot assume that he had a right to sell the spar, and recover the value of it in an action of assumpsit. As the plaintiff is at present unable to support the present action, I think the proper course to be adopted is, to set aside the verdict for the defendant, and enter a nonsuit; and then the plaintiff may bring a fresh action upon better materials, if he should be so advised.

BEST, J.—I am clearly of opinion that I ought to have

1822.

LEE v. SHORE.

nonsuited the plaintiff at the trial. I think there was not sufficient evidence to support this action. Perhaps the cases which have decided that tort may be converted into assumpsit, have been carried as far as they can be carried, and it may be worth while to consider, whether the authorities will bear out that principle as applied to this particular case. It has been held, that if a party waives the tort and brings assumpsit, he must prove a clear and undoubted title. It did not appear to me, that the plaintiff in this case had proved any title. The evidence of possession was involved in great doubt and difficulty; but supposing it to have been perfectly clear and satisfactory, still it appeared to me, that the person under whom the plaintiff claimed, was in no condition to confer upon him a valid title to this species of property, for he had let the land to *Bond*, and if a man lets land to a tenant, unless he excepts the right of possession as to a part, nothing passes to the third person to whom he may make a grant of the part supposed to be excepted. I cannot see how this spar could pass to the plaintiff under any agreement with the landlord, without the consent of the tenant. With respect to trees, it is expressly determined, that trees pass to the lessee if not excepted, and if the lessor grants to another " omnes boscos et arbores suas," nothing passes, because they passed to the lessee (*a*). That doctrine, I think, is distinctly applicable to the present case, because here, for any thing that appears to the contrary, the tenant was entitled to the exclusive possession of the land, unless he had expressly surrendered his rights with respect to this spar. In *White* v. *Sayer* (*b*), it is said, that if the lessor excepts trees, but grants to the lessee the right of cutting the loppings, and afterwards, the lessor enters upon the land without the consent of the lessee, to cut the trees, he would be a trespasser. If that be law, it is directly in point with the present case. Here, undoubtedly, the right to the spar is still in the landlord, but there is a right of possession in the

(*a*) 10 Vin. Abr. B. b. 14. 361. (*b*) Palmer, 212.

1822.



Lee v. Shore.

tenant, and unless the tenant has surrendered to the landlord the right of letting the spar to a third person, the landlord cannot make a good conveyance.

Judgment of nonsuit.



Tuesday, Nov. 26.

Mer v. Hopkins.

A writ of error does not stay proceedings, unless the party bringing it, positively states in his affidavit that there is error.

THE plaintiff having been nonsuited at the last Assizes for the county of *Northampton*, brought a writ of error, which the defendant treated as a nullity, and took out and levied execution for his costs. On a former day, a rule nisi was obtained for setting aside the execution for irregularity, it being executed after the allowance of a writ of error.

Andrews shewed for cause, that the writ of error was brought for delay, and that no errors had been assigned; but, independently of this, a nonsuited plaintiff could not bring a writ of error.

Abraham, for the plaintiff, answered, that the affidavit in support of the rule, stated that the plaintiff had been advised by his special pleader, and believed, there was error in the record, but as the affidavit did not state that there was any real error, and as none could now be pointed out,

The Court said, the writ of error was no supersedeas, unless there was reason to believe that there was real error. If the party bringing the writ of error would not pledge his conscience to the fact that there was error, the Court would not infer it. There was nothing stated to in Court to believe that there was any real error, a[illegible] fore there could be no stay of proceedings.

Rule discharged, with Costs.

1822.

The KING v. The INHABITANTS of PENEGOES and MACHYNLLETH.

Tuesday, Nov. 26.

After conviction and judgment at the Sessions, the Court will not grant a certiorari to remove the proceedings for the purpose of having an indictment quashed on motion for error on the record.

THIS was an indictment against the defendant for not repairing a bridge in the county of *Montgomery*; the defendants having been found guilty, and received judgment at the Sessions,

Sir *William Owen* now moved for a certiorari, to remove the indictment into this Court, for the purpose of having it quashed for several errors on the record. He referred to *Regina* v. *Dixon* (*a*), *Rex* v. *The Inhabitants of Oxfordshire* (*b*), and *Rex* v. *Nichols* (*c*).

ABBOTT, C. J.—I am clearly of opinion, that this is not a case in which we ought to grant a certiorari for the purpose mentioned. There have been cases, I believe, in which the Court has granted a certiorari to remove convictions, and the judgments found thereon, for the purpose of enforcing them; but those were cases moved at the instance of the prosecutor; and there may be many cases in which that would be a very proper course of proceeding. Here, however, the application is at the instance of the defendant for a certiorari, to remove the proceedings after conviction and after judgment, for the purpose of having the indictment quashed; which is in effect an attempt to obtain the advantage of a writ of error without the expence of it. There may be cases in which the Conrt has granted a certiorari before judgment, but it must be in the discretion of the Court, whether, after judgment, we will allow a certiorari,

(*a*) 1 Salk. 150, S. C. 6 Mod. 61. S. C. 2 Lord Raym. 971. S. C. 3 Salk. 78.

(*b*) 13 East, 411.

(*c*) Id. 412. n. (a).

1822.

Rex v. Penegoes.

in order that the indictment may be brought before us, to have it quashed. We think this is not a case in which such a discretion ought to be exercised in favour of the defendant. The regular and ordinary course is, to bring a writ of error; and we cannot upon motion do what may be done by a Court of error. The cases which have been cited do not warrant this application. Why did not the defendants apply to the Court before the prosecutor was suffered to incur the expence of a trial? This is a motion to save the expence of a writ of error by motion only, which cannot be allowed; for if we were improperly to quash the indictment, the prosecutor would have no remedy. The defendant must bring a writ of error, if he is so advised.

Holroyd, J. (a)—Said, he remembered a case from *Yorkshire*, where there was an application to remove the indictment after conviction, but he was not certain whether it was before judgment. He believed however, that judgment was afterwards given in this Court, and that the proceedings had been removed for the purpose of enforcing the conviction. Where the object is to annul the proceedings, the regular course is, to bring a writ of error; and as there is nothing in this case to take it out of the ordinary course, a certiorari ought not to go.

Best, J.—Concurred.

Certiorari denied.

(a) *Bayley*, J. was absent.

1822.

DURDON v. HAMMOND.

Wednesday, Nov. 27.

Bailable process cannot be made returnable so as to pass over a Term, but if a writ be sued out in *Trinity*, it may be made returnable on the last return of *Michaelmas* Term. Where a writ sued out in *Trinity*, was afterwards twice re-sealed and the return altered to the last day of *Michaelmas* Term, without a fresh stamp: Held, that the writ not having been used until the defendant was arrested, was regular, and need not have been renewed.

THIS was a rule calling on the plaintiff to shew cause why the bail bond given by the defendant, should not be delivered up to be cancelled, on filing common bail, under the following circumstances :—

The plaintiff had sued out a writ against the defendant in *Trinity*, returnable on the last return in that Term, and two days before the writ expired, he caused it to be re-sealed and the return day altered to the first return in this Term. The defendant not being arrested before the return of the writ, the plaintiff got the same writ re-sealed a third time and the return day altered to the last return in this Term; and the defendant having been arrested, he gave a bail bond, which was now sought to be cancelled, on the ground that these alterations in the return day of the writ were irregular and in fraud of the Stamp Acts, inasmuch as by the practice of the Court, there ought to have been a fresh writ sued out each time, instead of these alterations in the original writ. But

Per Curiam.—There is nothing irregular in this. The rule is, that if no use be made of the writ, it may be re-sealed, with a new return, provided the new return be not later than might have been originally introduced into the writ. It is clear, that originally the plaintiff might have made the writ returnable on the last day of this Term. In bailable process, certainly, a return day cannot be introduced so as to pass over a Term; but if a writ is sued out in *Trinity*, it may be made returnable on the last day of *Michaelmas* Term. This case comes clearly within that rule; and the writ not having been in fact used, it would be attended with great inconvenience and expence to the suitors

1822.

DURDON v. HAMMOND.

of the Court, if we were to hold, that because the writ was inoperative in the first instance, it became necessary to sue out a fresh writ with a new stamp. Here the writ is never used until the defendant is in fact arrested, and that is the test of the objection.

Rule discharged, with Costs.

Hutchinson, for the plaintiff, and *Brodrick*, for the defendant.

Wednesday, Nov. 27.

Ex parte KITE and Another.

The statute 57 *Geo.* 3. c. 87. s. 5. enacts, that when any person offending against the same, or any other Act relating to the customs or excise, shall be arrested, he is to be conveyed before one or more Justices of the peace "*residing near to the port or place into which the smuggling vessel is carried, or near to the place where any such person shall be so taken or arrested.*" Where two persons were apprehended in a smuggling boat, under this Act, whilst afloat in the port of *F.*, which had an exclusive local jurisdiction, and after being taken on shore and detained two days there, were carried on board again and conveyed into another port, where they were convicted by Justices of another jurisdiction. *Semble*, that such conviction was illegal.

If by the same statute Justices of one local jurisdiction have authority to convict for an offence committed within another, such authority must appear upon the face of the conviction. Therefore, where Justices of the port of *D.* convicted for an offence committed in the port of *F.* which had an exclusive jurisdiction, without shewing on the face of the conviction that they had authority to do so, the conviction was quashed.

THESE persons having been convicted by two Justices of the peace for the town and port of *Dover*, of smuggling, were, under the authority of 57 *Geo.* 3. c. 87. sent on board his majesty's ship *Gloucester*, for the purpose of serving in his majesty's navy, during a period of five years. On shewing cause against a rule nisi, obtained on a former day, for writs of habeas corpora, to bring up the defendants to be discharged from their commitment, on the ground that the convicting Justices had no jurisdiction, the facts disclosed were these:—

The defendants were apprehended on the 3d of *October*, in a smuggling boat, whilst they were locally within the port

1822.



Ex parte KITE.

of *Folkestone*, which port has an exclusive jurisdiction of its own. They were taken, together with the uncustomed goods found in their possession, on shore at *Folkestone*, and confined in a martello tower until the 5th of *October*, on which day they were put on board the boat again and carried by water into the port of *Dover*, and taken before two Justices of that town, and by them convicted under the 57 *Geo.* 3. c. 87. and sent on board the *Gloucester*. The conviction did not shew upon the face of it, that the *Dover* Justices had any jurisdiction over the offence imputed; it stated as a fact, that the boat in which the defendants were found, was seized in the port of *Folkestone*, but it omitted to shew that *Folkestone* was within the jurisdiction of *Dover*. It appeared from the affidavits, that the town of *Folkestone* is, for all purposes connected with the customs, within the limits of the port of *Dover*, and that the defendants were necessarily conveyed to the latter town, there being no customs warehouse, nor any proper officer appointed at that place, to receive the uncustomed goods seized and brought into the port. On the part of the defendants it was stated upon affidavit, that although there was no customs warehouse, nor any custom-house officer appointed at *Folkestone*, to receive uncustomed goods seized in that port, yet, that when such seizures were made, it was the invariable practice to take them to a store-house, and convey the smugglers before the *Folkestone* Justices for conviction; and that in this particular instance, application had been made to the Justices of that town to hear the case; whereupon a day was fixed by them to hear the complaint of the seizing officer, but for some reason the defendants were conveyed to the town and port of *Dover*, and there convicted. Under these circumstances the question was, whether the Justices of *Dover* had any authority to convict the defendants.

Jervis shewed cause. The Justices at *Dover* had jurisdiction to convict in this case; and the question turns upon

1822.

Ex parte KITE.

the statutes 45 *Geo.* 3. c. 121. s. 7. & 57 *Geo.* 3. c. 87. s. 5. By section 7, of the first mentioned statute, it is enacted that it "shall be lawful for any officer or officers of the army, navy, marines, customs, or excise, and he and they is and are hereby authorized, impowered, and required, to stop, arrest, and detain every such person, and to convey him before one or more of his majesty's Justices of the peace, *residing near to the port or place into which such ship, vessel, or boat, shall be taken or carried, or near to the place where any such person shall be so taken or arrested, &c.*" The section 5, in the last mentioned statute, is expressed in the same terms. These sections give jurisdiction to two descriptions of Justices, first, the Justices residing near to the port or place into which the boat shall be taken; and second, to the Justices near to the place where the offender shall be taken or arrested. The question then is, whether these men having been arrested afloat, in a place locally within the limits of the town and port of *Folkestone*, which has an exclusive jurisdiction, and lodged and detained there for two days, (*Folkestone* being, for all purposes connected with the revenue of customs, part of the port of *Dover*, and the vessel seized, being conveyed with these men from *Folkestone* to *Dover*,) the magistrates of the latter town had not jurisdiction to convict for the offence in question. It is not necessary that the conviction should shew that the magistrates of *Dover* had jurisdiction over the case, inasmuch as the act of Parliament has given a summary form of conviction which has been pursued; and though it appears on the face of this conviction, that the boat was seized, and these persons were apprehended in the port of *Folkestone*, yet it does not shew that *Folkestone* has an exclusive jurisdiction, and the Court will not intend that it has, in order to give effect to the objection. The fact being established that *Folkestone* is, for all purposes connected with the revenue of customs, within the limits of the port of *Dover*, that is sufficient to give jurisdiction to the Justices of the latter place, and therefore this conviction is perfectly correct.

1822.

Ex parte KITE.

Littledale, contrà. This conviction clearly cannot be sustained, unless it appears upon the face of it that the Justices of *Dover* had jurisdiction over this offence. It must either shew that the offence was committed within their immediate jurisdiction, or at all events that their jurisdiction was so connected with the place in which the offence was in fact committed, as to bring the case within their authority. Now, in the first place, it does not appear that this offence was cognisable by the Justices of the town and port of *Dover*, nor in fact that the offence was in any way connected with that place. Nothing can be collected from the conviction itself, from which it can be understood that the offence was committed within the jurisdiction of the Justices of *Dover*, assuming that they had any jurisdiction over the offence, which, it is submitted, they had not under the circumstances of this case. It is true that by the statute 47 *Geo.* 3. s. 2. c. 66. s. 44, if persons are apprehended on the high seas for any offence against the revenue laws, the Justices of the peace of any port into which they are taken, shall have the same power, as if the offence had been originally committed within their immediate jurisdiction. But it appears in this case that the original offence was committed within the limits of the jurisdiction of the *Folkestone* magistrates. The conviction merely states that the Justices are Justices acting for the town and port of *Dover;* but it does not state that they are acting for the town and port of *Folkestone.* Surely there ought to be some connection shewn between the two places, because it cannot be assumed that the magistrates of *Dover* have a jurisdiction in the town of *Folkestone.* The statement which has been made upon affidavit, that *Folkestone* is, for all purposes connected with the customs, within the jurisdiction of *Dover*, is answered by the fact that in this very case an application had been made to the *Folkestone* magistrates to hear the complaint against these persons, and the case would have been disposed of by them,

1822.

Ex parte KITE.

had not the seizing officer carried the alleged offenders before the *Dover* Justice. But, supposing the fact to be, as represented, still it must be shewn that the *Folkestone* magistrates had no jurisdiction in a matter of this nature. The magistrates of *Folkestone* have primâ facie jurisdiction over offences committed against the excise and custom laws, if the offence is committed within their jurisdiction. They have an exclusive commission of the peace, and even the county Justices could not interfere with their jurisdiction, still less the Justices of *Dover*; and the case of *Talbot* v. *Hubble*(a), which arose upon 12 *Car.* 2, c. 23, and 15 *Car.* 2, c. 2, is an authority to shew, that where a city has Justices with an exclusive clause, the Justices of the county cannot act in matters of excise. It seems clear that under the 47 *Geo.* 3, c. 66, the *Dover* magistrates could have no authority in the case, unless the offence was committed on the high seas. Had this offence been committed on the high seas, and the offenders been taken immediately, and in the first instance, into the port of *Dover*, then the Justices of that port would have had jurisdiction; but here they are apprehended in the port of *Folkestone*, where there is an exclusive jurisdiction; they are detained on shore for two days, and thence carried to *Dover*. On the face of the conviction it is not shewn that the offence is committed within the jurisdiction of *Dover*; the whole offence is committed within the jurisdiction of *Folkestone*, and the magistrates of *Dover* have taken upon themselves to make a conviction for which they had no jurisdiction. For these reasons the writs of habeas corpus ought to go.

ABBOTT, C. J.—Two questions have been raised in this case; first, whether the Justices of *Dover* had in fact any authority to take cognizance of this offence; and, second, assuming them in fact to have had that authority, whether the conviction is bad for not shewing the particular

(a) 2 Stra. 1154.

fact upon which their authority was founded. It is provided by 47 *Geo.* 3, s. 2, c. 66, s. 44, (which recites that doubts had arisen whether Justices could take cognizance of any offence or forfeiture committed on the high seas, and without the limits of the county, city, town, or place in which they acted), "that from and after the passing of this act, in all cases in which any Justice or Justices are empowered to take cognizance of any offence, or of any forfeiture in this act, or in any act or acts of Parliament relating to the revenue of customs or excise, it shall be lawful for any Justice or Justices of the peace for the county, city, town, or place within which the port or place into which any ship, vessel, boat, or goods, or any person or persons shall be taken, brought, or carried, under any act or acts of Parliament relating to the revenue of customs or excise, shall be situated, to take cognizance of such offence or offences as if the same had been committed on land within the jurisdiction of such Justices." It appears from the facts of this case, that the persons who are applying for these writs, were taken, on board a vessel having contraband goods in the harbour of *Folkestone*, and, in the first instance, the vessel was secured in that harbour. The parties were then taken on shore, within the limits of the local jurisdiction of *Folkestone*. After remaining in custody there for two days, they were again put on board the vessel and carried into the port of *Dover*. The case is then submitted to the Justices of *Dover*, and they convict the parties. That state of facts raises this question, namely, whether offenders of this description, being apprehended in a port on the water, and they and the vessel are voluntarily carried (not by any stress of weather) within the limits of a particular jurisdiction, and are lodged there, may be put on board again, and taken into any other port for the purpose of conviction? It will be very obvious, that if that can be done, it may lead to very considerable abuse; for, if instead of taking these persons and the vessel into the port of *Dover*, in the

1822.

Ex parte KITE.

first instance, as by law they might have been taken, they are taken in the first place into an other port, and afterwards removed thither, it is very difficult to say that they might not be taken to any port at the extremity of the coasts of this kingdom, to the west or to the north. It is difficult to say that that might not be done. Therefore, if it were necessary to pronounce any opinion upon that question, I should say, as at present advised, that the inclination of my opinion would be against such a construction of the statute. But I do not think myself called upon to give any decisive opinion upon that question, which should be binding upon myself or upon any other person, who may be called upon hereafter to give judgment upon it; and if ever I should be called upon hereafter to re-consider the question, my mind will be unbiassed upon it. I am however clearly of opinion, notwithstanding the form of conviction given by the 57 *Geo.* 3, that it is necessary it should appear upon the face of the conviction, that the convicting magistrates had authority and jurisdiction over the subject-matter of their decision. The form given by the statute begins first with the county, &c. as the case may be:—"Be it remembered," &c. Then directions are given to state the offence. The question then is, whether, when the offence comes to be stated, the place wherein it was committed—the county, riding, city, or liberty, &c. must not be stated, and if that is not done, whether the particular fact which gives the Justices authority beyond the county, riding, or place, &c. to which their jurisdiction extends, must not be stated. It is one of the first principles of the criminal law, as it regards proceedings before Justices of the Peace, and also in all other cases, speaking generally, that it should appear upon the face of the adjudication that the magistrates had authority and jurisdiction over the subject-matter of their consideration. That is the very first principle in criminal law. If we were to hold under this particular form of conviction, that it was unnecessary to do that in

1822.

Ex parte KITE.

order to give effect to this act of Parliament, we should be repealing, if I may so express myself, that general and almost universal principle to which I have alluded. Looking to the form of this conviction, it appears to have been prepared without adverting to the particular circumstances of the case. Undoubtedly cases may arise in which Justices of the Peace have authority beyond the place to which the precise terms of their commission extends. If we assume (and we do assume it) that the legislature intended that a conviction, in the form given by the statute, might be good to authorize Justices of the Peace in one county to convict for an offence committed in another, we should, at least, require the Justices to shew upon the face of their conviction that they had such a jurisdiction. For instance, suppose Justices of the Peace for the county of *Kent* were to convict for an offence under this act, committed at *Hastings* or *Brighton*, in *Sussex*, we should hold such a conviction to be bad, unless it was made certain that they had jurisdiction over an offence so committed. Under some circumstances the magistrates of one town or borough, and even of a county, have jurisdiction over offences committed within the local limits of another town, borough, or county; but if it is meant to rely upon the precise fact which gives the jurisdiction, that fact must be mentioned, in order that it may appear upon the face of the conviction under this act, as it must by law appear upon the face of all convictions, speaking generally, that the Justice has jurisdiction over the subject-matter. Without therefore giving any judgment upon the other question which has been raised, I am of opinion, that assuming the authority to convict in this particular case, the conviction is bad for not setting forth that special fact, namely, that the Justices of the Peace for the town and port of *Dover* had jurisdiction to convict for an offence committed in the port of *Folkestone*.

BAYLEY, J. and HOLROYD, J. were of the same opinion.

1822.

Ex parte KITE.

BEST, J.—It appears to me that the objection arising on the face of this conviction, upon which my Lord Chief Justice has declined giving any decided opinion, arises from the difficulty in which the magistrates found themselves. Previously to the passing of the statutes, which have been mentioned, magistrates had no authority to convict for offences on the high seas. We must look therefore to the statutes themselves to see what authority they give to the Justices. These acts of Parliament must be construed strictly in considering a case which places these persons in a situation of so much peril. In such a case every principle of law should be strictly pursued and observed. Now it appears to me, that when an offence under this act is committed on the high seas, out of the limits of the ordinary jurisdiction of the Justices, and the party is conveyed before a Justice residing *near to the port or place into which the vessel shall be carried,* that must mean the port or place into which the vessel is *first* brought. I do not mean first brought by stress of weather, and when the vessel gets out again to sea without landing, but the port or place where the offender is first *landed* and may be brought to justice. If that part of the 5th section of 57 *Geo.* 3. c. 87, does not mean "first brought" in the sense I have mentioned, I do not know why the officer of the customs might not take the party to two, three, or even five different ports, in order to find some magistrate more favourable to his views than any other. Such a discretion ought not to be recognized. It appears to me to be an extremely dangerous discretion, more particularly in a case so highly penal as this, where a man is to be deprived of his liberty, perhaps for a period of five years, without the intervention of a Jury

Rule absolute.

1822.

HODGSON v. FORSTER and Others.

Wednesday, Nov. 27.

After verdict found for the defendant, the Court will, in its discretion, order a nonsuit to be entered, in order that the plaintiff may not be precluded from bringing another action.

AT the last assizes for the county of *Cumberland*, for which notice of trial had been given, the defendant had a verdict entered for him, the plaintiff not appearing. No evidence was given on either side, and on motion to set aside the verdict, and enter a nonsuit, the question was, whether the Court had authority, under such circumstances, to enter a nonsuit? and, after hearing

Littledale for the plaintiff, and *Gaselee* for the defendant,

Per Curiam.—This is an application to the discretion of the Court, and if the Court sees a sufficient reason for granting it, we never refuse. This appears to us to be a case of that description. No later than yesterday (*a*) the Court directed a verdict, found for the defendant, to be set aside, and a nonsuit entered. We shall in this case direct a nonsuit to be entered, upon payment of the costs of the action.

Rule absolute (*b*).

(*a*) *Lee* v. *Shore and another*, ante, page 198.

(*b*) See *Gardner* v. *Davis*, 1 Wils. 300. 2 Saund. 336 (*a*). 14 Geo. 2. c. 17. and Tidd. 690. and 693.

Wednesday, Nov. 27.

In the Matter of CARGEY and AITCHISON.

By agreement C. and A. referred all matters in difference between them to three arbitrators, concerning the value of certain stock and goods, and also concerning the sum or sums which each should contribute towards the payment of 2500*l.* and the costs incurred in bringing and defending certain actions in which they were respectively interested. The arbitrators awarded, 1st. That all matters in difference should cease and determine. 2d. That *A.* should pay to *C.* 444*l.* 2*s.* 2*d.* his proportion of the sum of 2500*l.* 3d. That C. should pay five-eighth parts, and that *A.* should pay three-eighth parts of the costs of the actions mentioned in the submission. 4th. That all such sums as *C.* and *A.* had already expended in respect of the said actions, should be considered as part payment of their respective shares, according to the proportions before mentioned. 5th. That the costs of the reference should be paid by *C.* and *A.* in equal moieties; and, 6th. That upon payment of the 444*l.* 2*s.* 6*d.* the costs of the actions, and the costs of the reference, in the manner awarded, *C.* and *A.* should execute mutual releases. On motion to set aside this award, on the ground that it was not final, and was void for uncertainty, the Court refused to set it aside, the objections being pleadable to any action brought upon it, but would not grant an attachment for non-performance.

BY articles of agreement, dated 21st *May*, 1822, *Gilbert Cargey* and *James Aitchison*, submitted to arbitration, all differences which had arisen between them, concerning the value of the stock and goods, which each of them had received into his custody from a certain farm at *Great Ryle*, in the county of *Northumberland*, and also concerning the sum or sums of money, which, according to a previous agreement, they respectively should contribute towards the payment of a sum of 2500*l.* and the costs incurred in bringing and defending certain actions mentioned in the submission. In pursuance of this submission, the arbitrators awarded, "That all disputes and differences now or heretofore subsisting between them, or by the said *Gilbert Cargey* and *James Aitchison*, relative to the matters and things referred to us in and by the said hereinbefore in part recited articles of agreement, shall henceforth cease and determine; and we do further award, &c. that the said *J. A.* do and shall well and truly pay, or cause to be paid, unto the said *G. C.*, on the 16th of *July* next ensuing the date hereof, at the office of *E. E.*, attorney at law, &c. between the hours of ten of the clock in the forenoon, and two of the clock in the afternoon, the full and just sum of 444*l.* 2*s.* 2*d.* of lawful money of *English* value and currency; and we do hereby further award, &c. that the said *G. C.* shall pay, or cause to be paid, five eighth parts or shares, and the said *J. A.* shall pay three

eighth parts or shares of all such costs, charges, and expences, as have been incurred either in prosecuting the action brought by the said *G. C.* against the said *T. P.*, or of defending the said several actions wherein the said assignees of *J. F.*, a bankrupt, were plaintiffs, and the said *G. C.*, *J. A.*, *G. A.*, and *D. A.*, were defendants, or any or either of them; and we do hereby further award, &c. that all such sum and sums of money, as the said *G. C.* and *J. A.* have already paid, laid out, and expended, for and towards, or on account of the said suits, or either or any of them, or any way connected therewith, shall be considered and deemed as part payment of their respective shares, according to the proportions before mentioned. And we do also further award, &c. that all expences attending this arbitration, and of these presents, shall be paid and satisfied by the said *G. C.* and *J. A.* in equal shares and proportions. And, lastly, we do hereby further award, &c. that the said *G. C.* and *J. A.* shall, upon payment of the said sum of 444*l.* 2*s.* 2*d.*, and the costs, charges, and expences of the said several suits, and the charges and expences of this arbitration, execute unto each other mutual and general releases, &c. relating to the premises, &c. from the beginning of the world to the day of the date of the said hereinbefore in part recited articles of agreement, &c. In witness whereof, &c.

On a former day, in this Term, a rule nisi was obtained on behalf of Mr. *Aitchison* for setting aside this award, on the ground that it was not final, and that it was uncertain and void upon the face of it.

Robinson and *Wightman* now shewed cause against the rule. The award in this case is final, if it is sufficiently certain. Taking the whole together, no part of the matters referred are left undetermined. The award of the payment of a gross sum by *Aitchison* to *Cargey*, and the statement

1822.
In re
CARGEY.

of the proportions, in which each shall bear the costs and expences, is sufficiently certain, though the precise amount of the latter is not mentioned. It is clear that the gross sum is awarded to *Cargey*, in satisfaction to him of his share of the value of the stock and goods, and also *Aitchison's* contribution towards payment of the 2500*l.* As to the costs and expences, it is sufficient for the arbitrators to award the proportions to be paid by each, as it is only upon taxation that the precise amount of the costs can be ascertained. The rule, id certum est quod certum reddi potest, clearly applies to the case. *Wohlenberg* v. *Lageman* (*a*), *Bargrave* v. *Atkins* (*b*), and *Thomlinson* v. *Arriskin* (*c*), are authorities in favour of this construction.

Campbell, contrà, was stopt by the Court.

Per Curiam.—Even supposing the award in this case is not sufficiently certain, there is too much doubt upon it to justify us in setting it aside upon motion, more especially, as the objection is upon the face of the award, it may be pleaded to an action brought upon it; but at the same time we should hesitate before we should grant an attachment for non-performance.

Rule discharged.

(*a*) 6 Taunt. 254. (*b*) 3 Lev. 413. (*c*) Com. Rep. 328.

TAYLOR *v.* WHITTAKER and WIFE.

Wednesday, Nov. 27.

Husband and wife being arrested for a debt contracted by the latter dum sola, the rule for cancelling the bail bond given by the wife, for the irregularity was made absolute, but *without costs.*

HUSBAND and wife were arrested for a debt, contracted by the wife dum sola; the wife was let out of custody upon giving bail, and on motion that the bail bond for the wife should be delivered up to be cancelled, and that the plaintiff should pay the costs of the application; the question was, whether the rule should be made absolute with, or without costs, and

BAYLEY, J. (a) said, the wife was entitled to her discharge; but as many persons might doubt whether the wife was not also liable to be arrested with her husband for a debt contracted by her when sole, it was not a case for costs. If husband and wife are arrested, the latter is entitled to be discharged, the husband putting in bail for both.

Rule absolute, without Costs.

Patteson for the plaintiff, and *Wightman* for the defendants.

(a) The only Judge in Court.

The KING *v.* The SHERIFF of MIDDLESEX, in LISTER *v.* GOLDSTEIN.

Wednesday, Nov. 27.

Where time was given to the plaintiff to see whether bail were really possessed of the property, in respect of which they professed their ability to justify, and on the day appointed for coming up again, the bail, being rejected, immediately rendered the defendant:—Held, that the Sheriff was liable to an attachment, the notice of render not having been served until after the attachment had issued.

THE last day for justifying bail in this case was *Saturday*, the 16th of *November*. Notice of justification was given for *Friday*, the 15th, when the bail appeared, but

1822.

The King v. Sheriff of Middlesex.

the Judge who presided in the Bail Court being dissatisfied with the account they gave of their property, directed that the case should stand over until the following *Monday*, in order to give the plaintiff's attorney an opportunity of seeing their property and ascertaining its sufficiency. No rule was drawn up for this delay, and on the *Monday*, when the bail appeared again, they were rejected. Immediately after the rejection, the defendant was rendered, and notice of render was served at three o'clock in the afternoon; but in the interval on the same day, an attachment issued against the Sheriff for not bringing in the body. The question now was, whether the attachment was irregular, and if so, whether it ought not to be set aside, without costs, on the application of the bail to the Sheriff.

Gurney and *F. Pollock* contended, that the attachment was irregular, and therefore ought to be set aside without costs. Time had not been given to the defendant, but to the plaintiff's attorney, to inquire into the state of the property, in respect of which the bail came up to justify, and therefore the bail ought to have been placed in the same situation in which they would have been on *Friday*, the 15th, being one day before the time for justifying had expired. Had the bail been then rejected, they would have had an opportunity of rendering the defendant immediately in their own discharge; but the justification being postponed until the *Monday*, without a rule for that purpose, it would be hard to attach the Sheriff under such circumstances, because the same bail could not justify on the *Monday*.

Campbell, contrà, was stopped by the Court.

Per Curiam.—We think the attachment is regular, and can only be set aside upon payment of costs. If the bail had rendered the defendant on the *Monday* morning before they came up to justify, and had served notice of render im-

mediately after they had been rejected, then the Sheriff would have been safe; but the plaintiff was entitled to move for an attachment immediately after the bail were rejected, for want of this precaution.

Rule absolute, upon payment of costs (*a*).

(*a*) Vide 1 Chit. Rep. 356.

Bradney v. Hasselden.

Thursday, Nov. 28.

After judgment in ejectment had been signed in the year 1763, in which year the Court of Chancery granted an injunction to stay execution, and nothing appeared to have been done in the cause since, this Court refused to enlarge the term in the declaration, for the purpose of enabling a descendant of the original plaintiff to sue out a scire facias, in order to revive the judgment, and take out a writ of possession against the heir at law of the original defendant.

Ryan had obtained a rule nisi to amend the declaration in an action of ejectment, by enlarging the term from ten to seventy years, in order that the plaintiff might sue out a scire facias to revive the judgment, and take out a writ of possession. From the affidavits it appeared that at the *Lent* Assizes for *Staffordshire*, in 1763, the ejectment cause in question, was tried, and judgment signed by the lessor of the plaintiff in *Trinity* Term of that year. Immediately afterwards a writ of error was brought, and a bill in equity filed by the defendant, upon which an injunction was granted, restraining the plaintiff from executing his writ of possession, and since then the parties had slumbered upon their rights, no less than two generations having passed away. Under these circumstances, the question was, whether the Court would amend the declaration by enlarging the term, after so long a lapse of time.

Tindal, Alexander and *Patteson* shewed cause, and contended, on the authority of *Doe* v. *Tuckett* (*a*), that this rule must be discharged, and produced an affidavit on be-

(*a*) 2 Barn. & Ald. 773.

1822. BRADNEY v. HASSELDEN.

half of the defendant, who was the heir of the defendant in the original action, stating his belief that the disputes between the original parties had been long since settled by arbitration.

Gaselee and *Ryan*, contrà, drew a distinction between this case and that of *Doe* v. *Tuckett*, for there the Court said, that where a long period had elapsed after judgment signed, *and no delays had been interposed by the defendant* in the mean time, they would not permit the term in a declaration in ejectment to be enlarged. Now, here delay had been interposed by the defendant in the original action, for he had thrown impediment in the way, by filing a bill of injunction in Chancery. This application, if granted, would be mercy to the parties, to save the enormous expence of going into equity for the purpose of dissolving the injunction. He cited *Vickers* v. *Haydon* (a), as an authority to shew, that after judgment in ejectment from *Ireland* had been affirmed, this Court amended the declaration by enlarging the term, though the record was remitted to *Ireland*.

Per Curiam.—In that case the injunction had been dissolved before the term was enlarged. If parties choose to neglect their rights for so long a time, this Court cannot, per saltum, place them in the same situation in which they would have been fifty or sixty years since. Nothing appears to have been done in this case since the year 1763, and if the parties are entitled to any relief, they must go into equity to obtain a dissolution of the injunction. The plaintiff must pay the expence of this experiment; and therefore we shall discharge the rule, with costs.

Rule discharged, with Costs.

(a) Cowp. 841.

1822.



DOE, dem. DAVIS *v.* WILLIAMS, Esq.

Thursday, Nov. 28.

By the practice of this Court, the plaintiff in ejectment is not entitled to sign judgment against the casual ejector, until after the postea is brought in on the day in banc; but where, after verdict, by default of defendant the plaintiff sued out a writ of possession on the 6th *November*, without producing the postea, and executed it on the 12th, without any objection on the part of the defendant, until afterwards, the Court refused to set aside the writ, it appearing that the defendant had sustained no prejudice, and said, that if he had, that was matter of reference to the Master.

W. E. TAUNTON had obtained a rule calling upon the lessor of the plaintiff to shew cause why the writ of habere facias possessionem, should not be set aside for irregularity, and the possession restored. It was an ejectment to recover the possession of a mansion-house, &c. in *Cardiganshie*, and the defendant having suffered judgment by default at the last Assizes for *Herefordshire*, in not confessing lease, entry, and ouster, the lessor of the plaintiff sued out a writ of possession on the first day of this Term, and sent it down into the country, and on the 12th instant the plaintiff's attorney went to the premises with the writ, when possession was given up to the latter by the agents of the defendant's attorney, in order to avoid the publicity of an execution by the Sheriff's officer. The irregularity complained of was, first, in suing out the writ of possession before the return of the postea in banc; and, second, in not producing the postea when the judgment was signed; and the case of *Doe* v. *Copeland* (a), was cited.

Campbell shewed cause, and contended, that there was no irregularity in the plaintiff's proceedings, because, by the practice of the Court, the plaintiff might sign judgment, and take out the writ of possession immediately after the trial; but at all events in this case the writ was not in fact executed until the 12th *November*, on which day there was no doubt the plaintiff was entitled to possession, unless in the interval the defendant had taken any step by which the proceedings could be stayed. Besides which, supposing there to have been any irregularity, it was waived by the defendant, whose agents voluntarily gave up possession to the plaintiff's attorney when the writ was produced. He

(a) 2 T. R. 779.

1822.

Doe v. Williams.

distinguished this case from *Doe* v. *Copeland*, for *there* there was no consent rule, whereas *here* there was such rule.

W. E. Taunton, contrà. By the practice of this Court, which differs from that in *C. P.* judgment in ejectment cannot be signed until the postea comes in on the day in banc, for which *Doe* v. *Copeland* is an express authority; and therefore the lessor of the plaintiff could not in this case have sued out his writ of possession until the 11th of *November*, under any circumstances, for admitting the postea to come in on the first day of Term, namely, the 6th of *November*, still the defendant has four clear days to move the Court, if he thinks proper, to stay execution for any objection which may have arisen upon the proceedings. Then, in the second place, by the practice of this Court, the postea ought to be produced at the time of signing judgment, together with the certificate of the associate endorsed on the back of it; but here the postea was retained by the associate until several days after the execution had issued. *Sir Hugh Middleton's case* (a), and *Stanford* v. *Chamberlaine* (b). It cannot be said that the defendant has waived the irregularity; because he allows the plaintiff to enter into possession under the pressure of the writ, in order to avoid publicity, but in ignorance of the irregularity itself.

Abbott, C. J.—I think we ought not to grant the present application, which is to set aside a writ of possession executed on a day on which by law such a writ might be executed, more especially as it does not appear that the defendant has sustained any prejudice by the proceeding. I do not think it necessary to say positively whether the writ might or might not have issued on the first day of Term, or whether the party was bound to wait until the

(a) 1 Keb. 246, pl. 7.

(b) 5 Mod. 205, pl. 99. See Lilly P. R. 423, and *Turner* v. *Barnsby*, 1 Salk. 259.

day on which the rule for judgment expired, as in cases where rules for judgment are necessary. There might be very good reason for saying that the writ ought not to issue in vacation in such cases, because the party might move to set aside the nonsuit upon an allegation that he had not had due notice of trial. But without deciding whether the plaintiff was strictly regular in suing out the writ on the first day of Term, yet as it was executed with the consent of the defendant, who made no complaint until after the execution, I do not think we ought to interfere by setting aside the writ of possession. All that we can do, is to order that it shall be referred to the Master, to see whether the defendant has sustained any special damage by the premature issuing of the writ.

Bayley, J. was of the same opinion.

Holroyd, J.—It appears to me that the judgment in this case has been regularly signed. I think this case is essentially different from those cases where the rule for judgment must be drawn up after the return of the postea. The consent rule is the same almost as the rule for judgment. The consent rule is in form, that if the party does not confess lease, entry, and ouster, let judgment be entered. According to the practice of the *Common Pleas*, judgment may be signed, and execution taken out immediately after the trial. The practice here certainly is different, namely, that until the postea is returned, the officer has not the authority of the Judge, who presided at the trial, to grant the writ, and therefore perhaps judgment cannot be signed, and execution sued out upon the rule for judgment, until the postea has come in. But still, according to our practice, when a rule for judgment is given upon the return of the postea, it is done upon the assumption that the postea is produced, and execution issues without the Court in fact insisting upon its production. There being no fresh

1822.
Doe
v.
Williams.

rule for judgment in cases of judgment against the casual ejector, it appears to me that at the time of the return of the postea, the party is entitled to sign judgment, and therefore there is nothing to distinguish this case from the case where the rule for judgment may be given on the return of the postea.

Best, J.—I think the execution is regular. The rule for judgment is given upon the return of the postea, though it is not actually in Court; and it is not in Court until an application is made for a new trial, though it is assumed to be in Court, and the rule professes to be drawn up upon reading it.

Rule discharged, with Costs (a).

(a) Vide *Throgmorton*, d. *Fairfax* v. *Bentley*, 2 T. R. 780.

Thursday, Nov. 28.

Service of the declaration in ejectment upon the servant on a *Saturday*, with an acknowledgement by the tenant on a *Sunday*, insufficient for judgment against the casual ejector.

GOODTITLE, d. MORTIMER v. NOTITLE.

THE service of the declaration in ejectment in this case was upon the servant of the tenant in possession, on a *Saturday*, with an affidavit of acknowledgment by the tenant, on *Sunday*, that he had received the declaration.

Manning moved for judgment against the casual ejector upon this affidavit; but

The Court said, the service was insufficient, and therefore

Refused the rule.

1822.

FEATHERSTONE *v.* HUNT and Others.

Thursday, Nov. 28.

F. sold goods to *H. S.* and *P.* partners in trade, and received a bill of exchange for the amount, payable to his own order, drawn by *S.* and *P.* upon *H.* which was not accepted. *H. S.* and *P.* dissolved partnership before the bill became due, and at the time of the dissolution, had sufficient assets to pay all partnership debts. *S.* and *P.* then entered into a fresh partnership with two other persons, and carried on trade at *Newfoundland*, where the old firm had an establishment, and were there possessed of considerable property, which was sold to the new firm. *F.*, the holder of the bill, delivered it to *P.* to procure payment of it out of the assets of the old firm at *Newfoundland*, and *P.* in the adjustment of partnership accounts with *H.* expressly debited the latter with the amount of the bill, as having been paid out of the funds of the old firm, but the bill which was never cancelled was returned again to *F.* who sued *H. S.* and *P.* upon it. *S.* and *P.* who had in the meantime become bankrupts, suffered judgment by default:—Held, that *F.* had not so dealt with his debt as to discharge *H.*'s liability.

ASSUMPSIT for goods sold and delivered to the defendants, *Hunt*, *Stabb*, and *Preston*. The first named defendant pleaded the general issue, non assumpsit, on which issue was joined, and the other defendants suffered judgment to go by default. At the trial before *Abbott*, C. J. at the *London* Second Sittings, in this Term, the plaintiff had a verdict.

The case was this:—The plaintiff was a merchant, residing at *Wivelscombe*, in *Devonshire*. In and previously to 1819 the defendants were members of a mercantile house at *Torquay*, in the same county, under the firm of *Hunt*, *Stabb*, *Preston*, and *Co.*, having a mercantile establishment at *Newfoundland*. The defendant *Hunt* resided in *London*, and was there connected with another separate mercantile house. This action was brought to recover the sum of 331*l.* 4*s.* 9*d.*, for goods sold by the plaintiff to the defendants, and shipped to *Newfoundland* to their order. In payment of these goods *Stabb* and *Preston* drew a bill upon *Hunt* and *Co.*, in favour of the plaintiff, dated 4th *February*, 1819, payable three months after date, but which bill was not accepted. After the bill was drawn and delivered to the plaintiff, the defendants dissolved their partnership, at which time they had sufficient property at *Newfoundland* to pay all partnership debts. The defendants *Stabb* and *Preston* then formed another partnership connexion at *Newfoundland*, with two other persons, named

1822.

FEATHERSTONE v. HUNT.

Sherman and *Prowse*. The new partnership purchased of the old firm the property which belonged to the latter, and, after a valuation taken, the amount was placed to their credit. In settling the affairs of the old firm, the new partnership received and paid various sums due to and from Messrs. *Hunt, Stabb, Preston*, and Co. The plaintiff, finding that the bill drawn upon *Hunt* and Co. was not accepted by them, sent it out to *Preston* at *Newfoundland*, for the purpose of having it paid out of the assets of the old firm received by the new one. Afterwards, in settling the accounts between the old and the new firm, the latter debited *Hunt*, the retired partner, with various payments, which they had made in satisfaction of demands upon the old firm, and, amongst others, with the amount of the plaintiff's demand, and in the account shewn by the new firm to an agent of *Hunt*, who went out to *Newfoundland*, he was in express terms charged with the amount of the bill drawn in the plaintiff's favour, as having been paid by them. Early in 1821 *Preston*, the defendant, returned to *England* from *Newfoundland*, and in an interview with the plaintiff informed him that he had mislaid the bill; but offered to give him another bill for the amount, drawn by *Stabb, Preston*, and *Prowse*, (*Sherman* having then left the firm) upon *John Sparke Prowse*, of *London*, which he agreed to take, but expressly reserving his remedy against the original firm upon the first bill, in case of non-payment of the new one. The plaintiff accordingly took the bill so drawn. Shortly after this, *Stabb, Preston*, and *Prowse*, became bankrupts, and the original bill came into the plaintiff's possession, and now formed the subject of one of the counts of the declaration. It appeared that the plaintiff had had dealings with the new firm until they became bankrupts, and at their last examination proved a debt of 130*l*. 5*s*. 4*d*. under their commission. The question at the trial was, whether the plaintiff had, under these circumstances, so dealt with his debt as to discharge the defendant *Hunt* and his part-

ners? The learned Judge told the Jury, that whatever adjustment of accounts might have taken place between the defendants themselves, that would not deprive the plaintiff of his right to sue them all. If, indeed, the person who acted for *Hunt* at *Newfoundland* had demanded the bill in question of *Preston*, or had insisted upon the cancellation of it, on the ground that *Hunt* had been debited with the amount in the partnership accounts, that certainly would have been in law a discharge; but as the bill had not been in fact given up, he was of opinion that *Hunt* was still liable as one of the partners in the old firm. Under this direction the plaintiff had a verdict.

Wilde now moved, on behalf of the defendant *Hunt*, for a rule to shew cause why the verdict should not be set aside and a new trial granted. He insisted that the plaintiff had so dealt with his debt, as to discharge the liability of this defendant. The fact of the plaintiff giving *Preston* authority to obtain payment of the bill, constituted the latter such an agent of the former, as to tie him up from suing *Hunt*. In this transaction, the plaintiff gave *Preston* full power and authority to act for him as his agent, by indorsing the bill over to him. By virtue of this authority *Preston*, the partner of *Hunt*, debited the latter with the amount of the bill in the adjustment of their accounts, and by this proceeding the bill was in effect paid by *Hunt*, because the money which would otherwise come to him as his portion of the partnership funds, was appropriated to the discharge of his liability upon the bill. Under such circumstances, the case fell within the general principle, that where one authorises another, and gives him the power, as in this case, to settle and adjust his debt, and the debt is settled and adjusted accordingly, he cannot afterwards come upon the person with whom the adjustment has taken place.

1822.

FEATHERSTONE
v.
HUNT.

ABBOTT, C. J.—I am of opinion that there is no ground for disturbing this verdict. It appeared at the trial, that the plaintiff had put this bill into the hands of *Preston*, one of the drawers, and one of the new firm, in order that he might recover the amount of it for him at *Newfoundland*. When *Preston* came home, the plaintiff applied to him and desired to know whether he had got the money; *Preston* said he had not; upon which the plaintiff said "then give me the bill." *Preston* could not then find it, but gave the plaintiff another bill to the same amount, the plaintiff saying, "I only take this until you can find the old bill, for I will not give up my rights upon that bill." When *Preston* went to *Newfoundland*, the new firm took possession of the bill to hold it as against *Hunt*, for such payments as they might make on account of the old firm, of which he was a member. The defendant *Hunt* did not, as is supposed, send out an agent to *Newfoundland*, for the specific purpose of arranging the concerns of the old firm. That indeed was suggested, but when the supposed agent was cross-examined, he said, distinctly, that he was not sent out specifically as agent for *Hunt*. What he said was this—"I was at *Newfoundland*, and I was desired by *Hunt* and *Co.* to see to the assets of the old firm; for which purpose I applied to *Stabb, Preston* and *Co.*, and *Preston* told me he had applied the proceeds of the property belonging to the old firm, to the discharge of certain debts of the old firm, due in *England*, and he produced his account to me, in which account was included the bill in question, as being paid by him, *Preston*, and his new partners." I told the Jury, that whatever took place between the members of the old firm, who were all liable to the plaintiff, would not deprive him of his right to sue them all. I stated, however, that if the supposed agent of *Hunt* had said, "give me up the bill, and I shall deliver the bill to *Hunt*," and *Preston* had so done, then, in my opinion, *Hunt* would have, in law, been discharged; but the security not having been given

up, I thought he was still liable. I think, that if one partner chooses to rely upon the mere word of another, that a partnership debt is satisfied, without having the security upon which he is liable, delivered up, he must take the consequences of his own want of caution.

1822.

FEATHERSTONE *v.* HUNT.

BAYLEY, J.—As the bill was not cancelled or delivered up to *Hunt*, in proof that the debt had in fact been satisfied, the statement of his partner that it had been paid, is not sufficient to discharge his liability. He must take the consequence of his own want of caution in not insisting, through his agent, upon having the bill delivered up. As this had not been done, I think he is still liable in this action.

BEST, J. (*a*)—Was of the same opinion.

(*a*) *Holroyd*, J. was absent.

M'BEATH *v.* CHATTERLEY.

Thursday, Nov. 28.

Where a widow was arrested upon a bill of exchange, accepted by her in the name of *W. S. Chatterley*, by which name she had always gone since her husband's death; *W. S.* being the initials of her husband's christian names: the Court set aside the bail bond only, on entering a common appearance.

THE defendant, a widow, was arrested on a bill of exchange, accepted by the name of *W. S. Chatterley*, and held to bail. On motion to set aside the whole proceedings, an affidavit was produced, that the defendant's christian names were *Marie Louise Antoinette Florence*, by which names she had been baptized, and that *W. S.* were the initials of her deceased husband's christian names. In answer to this an affidavit was put in on the other side, which stated, that the defendant had, since her husband's decease, been always called and known by the name of Mrs. *W. S. Chatterley*, and had always used that description of herself.

Reader shewed cause, and *Abraham* was heard in support of the rule; and *Reynolds* v. *Hankin* (*a*), and *Parker* v. *Bent* (*b*), were cited.

(*a*) 4 B. & A. 536. (*b*) Ante, 73.

1822.

M'BEATH v. CHATTERLEY.

The Court said, they would not set aside the whole proceedings, but would order the bail bond to be delivered up to be cancelled, on entering a common appearance.

Rule absolute in these terms, but without Costs.

Thursday, Nov. 28.

Ex parte MATSON, Gent.

An attorney who discontinues to practise after his last certificate has expired, may be re-admitted without payment of any arrears of duty, or any fine. The word "neglect" in 37 *G.* 3. c. 90. s. 31. means "culpable neglect," and does not apply to a person who has omitted to take out his certificate during the interval of his ceasing to practise.

CHITTY moved to re-admit an attorney who had ceased to practise since 1817, upon the usual affidavit required in such case, and prayed that he might be re-admitted on his taking out a certificate to practise, and on payment of the duty for the present year, without any arrears of duty or any fine. He cited *Ex parte Clarke* (*a*), as an authority for the application, which case, he said, had been since acted upon in many instances under similar circumstances.

Shepherd, on behalf of the Stamp Office, opposed the application, and contended, that the case cited had been erroneously decided. He insisted, that according to the true construction of 37 *Geo.* 3. c. 90. s. 31, the arrears of duty ought to be paid from the time of taking out the *last* certificate. The 31st section of the statute enacted, that every admitted attorney who should neglect to obtain his certificate for the space of one whole year, should from thenceforth be incapable of practising, and his admission should be from thenceforth null and void; "Provided always, that nothing hereinbefore contained, shall be construed to prevent any of the said Courts from re-admitting any such person on payment of the duty accrued *since the expiration of*

(*a*) 2 B. & A. 314. See *Ex parte Richards*, 1 Chit. Rep. 101. and *Ex parte Nicholas*, 6 Taunt. 408. In 1 Chit. Rep. 103, there is a good form of affidavit on re-admission, under circumstances similar to the present

the last certificate, and such further sum of money by way of penalty, as the said Court shall think fit to order and direct." From the fair construction of these words it is clear, that in all cases where an attorney has neglected to take out his certificate, the arrear of duty must be paid since the expiration of the *last* certificate, and it is only in case of some improper conduct in the interval, that the Court has power to superadd a penalty if it sees proper.

ABBOTT, C. J.—I think the case of *Ex parte Clarke* was properly decided. The words of section 31, "shall *neglect* to obtain his certificate," must be taken in connexion with the proviso for re-admission on payment of the arrears of duty since the last certificate. The distinction is this; when the party has been *practising* in the interval, he must pay the arrears of duty; but not so when he has not practised. The word *neglect*, imports *culpability*. Can we say that an attorney *neglects* to take out his certificate who does not practice? Does not the term *neglect*, import a forbearance to do that, which by law a man ought to have done? The party, in cases of this description, stands nearly in the same situation as a person, who, in the first instance, makes an application to be admitted. I think the word *neglect*, imports an omission to do that which by law the party ought to have done; and that the case in which the arrears of duty are to be paid, and a fine to be imposed, is only where the party having been admitted continues to practise, and *neglects* to take out his certificate between the interval of his first certificate, and the time when he applies to be re-admitted. If the party has not practised in the interval, he is not required to pay the duty.

BAYLEY, J.—I am of the same opinion. The proviso for re-admission on payment of the arrears of duty, applies only to such persons as have *neglected*, and not to those who have *omitted* to take out their certificates. In construing

1822.



Ex parte MATSON.

this proviso, the Court thought, in the case of *Ex parte Clarke*, that the neglect to take out the certificate must be a *culpable neglect*. Unless the party has been practising in the interval, he is not subjected to the payment of the arrears of duty.

BEST, J. (*a*)—The case of *Ex parte Clarke* has been constantly acted upon ever since, and it is now too late to disturb that decision.

Admission allowed, on the terms prayed.

(*a*) *Holroyd*, J. was absent.

Thursday, Nov. 28.



PEERS *v.* GADDERER.

A defendant arrested for a debt contracted, partly before and partly after bankruptcy and certificate, there being a subsequent promise for the former part, was discharged out of custody on filing common bail.

ON motion to discharge the defendant out of custody on filing common bail, the question was, whether a person could be arrested for a debt, a portion of which had been contracted before a commission of bankruptcy had issued against him, and the remainder after he had obtained his certificate, he having made a subsequent promise to pay that portion of it which was contracted prior to the bankruptcy?

After hearing *Platt*, for the plaintiff, and *Campbell*, for the defendant, and the cases of *Wilson* v. *Kemp* (*a*), *Horton* v. *Moggridge* (*b*), *Bailey* v. *Dillon* (*c*), and 5 *Geo.* 2. c. 30. s. 7. being referred to,

The Court were clearly of opinion, that the case of *Wilson* v. *Kemp* must govern the decision of this case, and that the defendant therefore was entitled to be discharged

(*a*) 3 M. & S. 595.

(*b*) 6 Taunt. 563.

(*c*) 2 Burr. 736.

1822.

PEERS v. GADDERER.

out of custody on filing common bail. Suppose the defendant were kept in custody, he might plead his certificate, and even if a special replication was put upon the record, still it would be a question of fact, whether the defendant had made himself liable by virtue of a new promise; but the Court would not in the interim hold him to bail until that question was decided.

Rule absolute, with Costs, defendant undertaking to bring no action.

The KING v. GEORGE WEBB HALL.

Thursday, Nov. 28.

The Courts of Requests Act, 25 *Geo.* 3 c. 38. s. 8. declares that no person shall be capable of acting as a commissioner in the execution of any of the Acts for constituting such Courts, unless such person shall be a *householder* within the county, &c. for which he shall act. The word "householder" in this Act, does not mean a personally resident housekeeper, and therefore, where a person had been elected to the office of registrar and clerk of the Court of Requests of the city of *Bristol*, by a majority of householders, paying rent, rates, and taxes, and resident by their partners in trade or their servants only:—Held, that the election was valid.

THIS was an information in the nature of a quo warranto against the defendant, calling upon him to shew by what authority he exercised the office of registrar and clerk of the Court of Requests of the city of *Bristol*. At the trial before *Graham*, B., at the *Bristol* Summer Assizes, 1819, a verdict was found for the Crown, subject to the opinion of the Court, upon a special case.

The office of registrar and clerk of the Court of Requests, in the city of *Bristol*, having become vacant by the death of a gentleman named *Bengough*, an election took place on the 2d *May*, 1818, to supply the vacancy. On that occasion thirteen persons attended and gave their votes, eight for the defendant, and five for Mr. *Palmer*, another candidate. The eight who voted for the defendant were *Levi Ames, Michael Castle, George Hilhouse, William Fripp, William Fripp* the younger, *Levi Ames* the younger,

1822.
The KING
v.
HALL.

Edward Brice, and *James George*. The question for the opinion of the Court was, whether these persons were *householders* within the meaning of the Courts of Requests Act, 26 *Geo.* 3. c. 38. s. 8, by which it is enacted, "that after the 24th of *June*, 1786, no person shall be capable of acting as a commissioner in the execution of any of the acts for constituting such courts, unless such person shall be a householder within the county, district, city, liberty, or place, for which he shall act, and shall be possessed of a real estate of the annual value of 20*l*., or of personal estate of the value of 500*l*." It was admitted, that if any five of the persons, who voted for the defendant, should be adjudged householders within the meaning of this statute, the judgment of the Court should be pronounced in his favour. The case set forth, with great particularity, the qualifications in respect of which each of these persons claimed the right of voting as a householder. It appeared, on substance, that each was a partner in a firm carrying on trade in *Bristol*; that each was the holder of a dwelling-house there, and paying rates and taxes in respect thereof; that each, either by a partner or a servant, occupied and slept in the house; that each was in the daily habit of resorting to the dwelling-house, or some other building connected with it, for the purposes of business; that each was a person of substance and respectability; that none of them personally slept on the premises, in respect of which they respectively claimed the right of voting; and that each had a dwelling-house out of the city of *Bristol*, in which they respectively slept and resided.

On a former day the case was argued by *Selwyn* for the Crown, and *Adam* for the defendant.

For the Crown it was contended, that the word "householder," as used in the statute 26 *Geo.* 3. c. 38. s. 8, meant "the master of a family," who was domiciled by personal

1822.
The King v. Hall.

residence and occupancy in the house held by him, and consequently that none of these persons were qualified to vote for the defendant. The authorities cited were *Johnson's Dictionary*, where "householder" is called "master of a family;" *Tomlin's Law Dictionary*, where it is said "Householder (*pater familias*) is the occupier of a house, a housekeeper, or master of a family;" 2 Inst. 702., *Rex* v. *Barwick* (*a*), *The Overseers of Weobly* (*b*), *Mayor of Colchester* v. *Goodwin* (*c*), *Waller* v. *Hanger* (*d*), *The Mayor of London* v. *The Mayor of Lynn* (*e*), *Stephens* v. *Derry* (*f*), *Rex* v. *Nicholson* (*g*), *Rex* v. *Jones* (*h*), and *Hemming* v. *Plenty* (*i*). Reference was also had to the 22 *Geo.* 2. c. 47. 23 *Geo.* 2. c. 27. 3 *Geo.* 2. c. 25. s. 19. and 23 *Geo.* 2. c. 30. and to 1 Harg. L. T. 128. and 7 Bro. P. C. Tomlin's edit. 131. 134.

For the defendant the following arguments were urged:— The construction endeavoured to be put upon the word "householder" is by no means warranted either by the authorities cited, or by common usage and parlance. It may, perhaps, on some occasions, bear the sense attributed to it; but, generally speaking, it imports only the keeping a house for the purposes of trade, without any necessary implication of personal residence. It is attempted to support the definition contended for, by giving to the word "householder" the extensive use and meaning of the word "household;" but this is by no means a reasonable conclusion: the two words import very different meanings, and describe very distinct situations; the first defines an individual person; the last is a noun of number, and there is no sort of analogy existing between them. The object and intention of the legislature in imposing this qualification was no more than that the electors should be persons connected with the interests

(*a*) 7 T. R. 33.
(*b*) 2 Str. 1261.
(*c*) Carter, 114.
(*d*) 3 Bulstr. 14.
(*e*) 1 Bos. & Pul. 487.
(*f*) 16 East, 147.
(*g*) 12 Ibid. 330.
(*h*) 8 Ibid. 450.
(*i*) 1 J. B. Moore, 529.

1822.

The KING v. HALL.

of the city, familiar with its customs and affairs, associating and transacting business with its citizens, and well known in it as men of respectable characters and responsible situations. All these qualifications are eminently conspicuous in the persons who have voted for the defendant in this case, and they are sufficient to legalize their votes and to satisfy the requisites of the statute. If these electors are not qualified on account of their non-residence, no qualified electors can be found; for, in modern times, it has become an almost universal habit for the most respectable and wealthy traders, in all great and commercial towns, to live out of those towns, though they daily resort to them for the purposes of business, and in no one place does that habit prevail more generally than in *Bristol*. It is expressly declared by Lord *Coke*, in his commentary on the statute of Bridges, that a person in possession of a house, occupied merely by his servants, is liable to pay the rates assessed upon it (*a*); and surely if such an occupation makes a man a householder, so far as his liabilities are concerned, it ought to have a similar effect as respects his privileges. In the statute 26 *Geo.* 3. c. 100. s. 2, which regulates the right of voting at elections of members of parliament, there is this expression to be found, " inhabitants householders resiants," as one joint description; the inference from which is conclusive, that there may be " inhabitants householders" who are not " resiants," and that neither of the two former words includes residency. So, in the statute 11 *Geo.* 1. c. 18. s. 10. it is provided, that partners carrying on trade in one house, as *householders*, for the rates of which they are jointly liable, shall vote at elections for the mayor and aldermen of *London*, while the next section enables two persons *inhabiting* in the same house to vote, clearly shewing that a householder was not, in the view of the legislature, a person " inhabiting in," or resident in, a house. So, in the case of *Rex* v. *Barwick* (*b*), Lord *Kenyon* expressly

(*a*) 2 Inst. 702.

(*b*) 7 T. R. 33.

lays down a distinction between "occupancy" and "inhabitancy." It is an admitted fact in the case that all these parties were liable to, and actually paid, parochial rates upon the houses of which it is contended they are not the *holders*. Upon what principle have they paid those rates? Would it have been a good answer to a demand of those rates, to say, "I am not the house*holder*, I am only a house*keeper;* I only occupy by means of a servant, or a partner, and therefore I am not liable?" The absurdity attendant upon the argument refutes it. It is a householding sufficient to impose the burthen, and there is no reason, and no law, that can prevent its also conferring the privilege. The cases brought forward on the part of the Crown are all distinguishable mainly from the present, as might be easily shewn; but there are other cases directly in point, and affirmative of the defendant's case. It is said by Lord *Ellenborough*, in *Bertie* v. *Beaumont* (a), that the occupation of a servant is the occupation of the master; and he refers to a previous case of *Rex* v. *Stock* (b), where it was decided, that a burglary being committed in premises belonging to three partners, and occupied by their joint servant, it was well laid as committed in the dwelling-house of the partners. As respects the equity of this case, and the intention of the legislature, there can be no doubt that both are fully satisfied in the persons of the electors, who are now objected to; and upon a fair construction of the word "householders," and an impartial view of all the legal decisions upon similar questions, there can be as little doubt that in point of law the defendant has been well elected, and is entitled to the judgment of the Court in his favour.

The Court took time to consider the case, and judgment was now delivered by

Abbott, C. J.—This case came before us on an in-

(a) 16 East, 33. (b) 2 Taunt. 339.

1822.

The KING v. HALL.

formation, in the nature of quo warranto, against the defendant, calling upon him to shew by what authority he held and exercised the office of registrar and clerk of the Court of Requests of the city of *Bristol*. In answer to the information the defendant set forth his election, and issue was joined upon the question whether he had a majority of votes, that is, of good votes. It appears by the case, that so far as a numerical majority went that issue was found for the defendant; but a question arose, whether those votes were substantially and legally good, which question now remains for our decision, and depends entirely upon the construction of the word "householders" as used in the statute 26 *Geo.* 3. c. 38. By the statute 1 *W.* & *M.* the mayor, aldermen, and common council of the city of *Bristol*, were appointed commissioners of the Court of Requests of that city. In that statute the official corporate character was the only qualification required. Many acts of parliament for the establishment of other similar courts had passed previous to the 26 *Geo.* 3. The latter is a general law, and must be understood, with reference to the Court of Requests at *Bristol*, to have superadded the qualification of "householders," whatever may be its bearing upon the qualifications before required. Now, the true meaning of particular words in acts of parliaments is to be found, not so much in a strict etymological propriety of language, nor in popular usage, as in the subject-matter of the occasion in which they are used, as connected with the object which is sought to be attained. The meaning of the word "inhabitants" in the statute of Bridges, 22 *H.* 8. c. 5, which was cited in the course of the argument, affords an illustration of the proposition very applicable to the present case. That statute speaks of the inhabitants of any county, city, or other place. Taking that word either in its strict or its popular sense, it is there applied to those persons only "who have a dwelling therein," and all persons who have a dwelling therein are there spoken of as "inhabitants

thereof." But the object of that statute being to raise a fund for the repairs of the bridges in the county, by the taxation of persons in reasonable proportions to their property therein, or (in case of refusal) to enforce the payment of such tax by distress on the lands, goods, or chattels of the persons rated, the word "inhabitant" has there been held to include all the *occupiers* of land in the county, although not actually *dwelling* in the county. The object of the statute 26 *Geo.* 3. c. 38, however, is very different. That seems to have been to unite respectability of character, and competency in circumstances, in the place where the office is to be exercised, with notoriety in, and habits of access and resort to it. This object is attained by excluding lodgers and inmates, and persons who have no permanent connexion with and resort to the place. The word in this statute is "house*holder*," not "house*keeper*." The word "householder," in whatever sense taken, would certainly exclude the classes I have mentioned, and probably some others, as not being in the strict sense of the word "house*keepers*." It is sufficient for the purpose of this cause, if five of those who have voted for the defendant, and whose right to vote is disputed, shall be found to be householders within the true meaning of the statute; and we are of opinion that five, namely, *Levy Ames*, *Michael Castles*, *George Hilhouse*, *William Fripp*, and *Edward Brice*, are such householders. Each of these persons is a partner in a firm carrying on trade in *Bristol*, or a holder of a dwelling-house there; each of them, either by a partner or a servant, occupies and sleeps in the house, and each is in the daily habit of resorting to that dwelling-house, or some other building connected with it, for the purposes of business. In the first case, that of *Levy Ames*, the dwelling-house belonging to him is annexed to the premises where the business of his firm is carried on, and is occupied by, or in the care of a clerk of that firm. In the two succeeding cases, the parties carry on business in a ware-

1822.

The King v. Hall.

house adjoining a dwelling-house, held by the firm, and occupied by a servant, and in all these cases the rents, rates, and taxes are paid by the firm. In the case of Mr. *Fripp* and Mr. *Brice*, they are partners in a banking-house, which they occupy in the way of their trade, and behind which there is a dwelling-house belonging to the firm, and for which the firm pays the rates and taxes. So that in every one of these five cases there is a dwelling-house belonging to, or rented by the partnership, and annexed to premises in which the partnership business is conducted, and occupied either by servants, or partners of the firm, as a dwelling-house. Under these circumstances we are of opinion that each of these parties is to be deemed a householder within the meaning of this statute, and it is therefore unnecessary to say any thing respecting the other three persons who voted for the defendant. It must be obvious to every man who has the slightest knowledge of the habits of the more respectable classes of the trading world in all the great towns in *England*, that an exclusion of persons in the situation of these gentlemen would operate as an exclusion, both in this and many other cases, of a very large portion of those very persons, who are in all respects best qualified for the discharge of those duties, which form the subject of the present inquiry. For these reasons, we are of opinion that we are bound to give our

Judgment for the defendant.

The King v. The Inhabitants of Hendon.

Thursday, Nov. 28.

A poor-rate having been made on the 9th, allowed on the 11th, published on the 14th, and the Sessions commencing on the 15th of *April*:—Held, that an appeal against the rate need not be entered until the Sessions next but one after the publication of the rate.

ON the 9th *April* a poor-rate was made upon the inhabitants of *Hendon*, was allowed on the 11th, and published on the 14th of the same month. On the 15th the *Middlesex* Sessions commenced, but certain individuals, who had intended to appeal against the rate, did not enter their appeal until the next succeeding Sessions, when the Justices refused to receive it, on the ground that it ought to have been entered at the Sessions immediately next after the making of the rate; and on motion for a mandamus to the Justices to enter continuances and hear the appeal,

The Court was of opinion, on the authority of *Rex* v. *The Justices of Sussex* (a), that the mandamus ought to go. The next Sessions meant the next practicable Sessions at which an effectual appeal could be lodged after the allowance and publication of the rate. The publication in this case was so close to the next Sessions, that it was impossible for the defendants, with any reasonable expedition, to avail themselves of the right of appeal.

Rule absolute.

Bolland, for the Crown; *Andrews*, for the defendants.

(a) 15 East, 206.

Thursday, Nov. 28.

One of the yeomen of the King's guard had been arrested in the *Palace Court*, and by habeas corpus cum causâ removed the case into this Court, and had put in and perfected bail upon the habeas:—Held, that the bail could not be exonerated, even supposing the defendant privileged from arrest.

SARD *v.* FORREST.

THIS was a rule, calling on the plaintiff to shew cause why an exoneretur should not be entered on the bail piece. The affidavit in support of the motion, stated, that the defendant had been arrested on a writ out of the *Palace Court*, and had removed the cause by habeas corpus, on which he had put in bail in this Court; that he was one of the yeomen of his Majesty's guard of his body; that as such he was liable at all times to be called on to attend the King's person wherever the guard should be appointed; that he had been in attendance several hundred times since his appointment in 1816; that he had an annual stipend, and by his certificate of appointment, was, among other things, declared to be privileged from arrest. The affidavits in answer to this, stated that a similar motion had been made in the Court below, and had failed, that interlocutory judgment had been signed in the inferior Court before the cause was removed; that since the removal a writ of inquiry had been executed in this Court; that the defendant carried on a trade, and contracted the debt in question in the way of his trade.

Erle now shewed cause against the rule. On several grounds this application is not sustainable. First, the privilege from arrest is given to the King's servants, with a view only to prevent inconvenience arising to his Majesty from the want of their personal attendance. That inconvenience cannot arise where the defendant is out on bail, and therefore this privilege is no ground for exonerating the bail. Second, supposing bail in common cases could maintain this application, still such relief cannot be given to bail upon habeas corpus sued out by the defendant. Where the defendant in the inferior Court is not on special bail, he

1822.

SARD
v.
FORREST.

cannot remove the cause by habeas corpus, without putting in and perfecting bail in the superior Court. If the bail fail to justify, a procedendo issues of course. The defendant has, by his own choice, sued out the habeas corpus, and has used the bail for his own purpose in preventing the cause from being remanded, and therefore he ought not to have them exonerated. When the time has arrived for the plaintiff to resort to them, they ought to be treated either as valid from the beginning, or null from the beginning; and, Third, the privilege claimed by the defendant ought not to be allowed on motion; for on the authority of *Luntley* v. *Battine* (a), and *Tapley* v. *Battine* (b), he ought to be left to his writ of privilege.

Marryatt, contrà. The services required of the defendant are clearly such as to render it necessary he should be privileged from arrest. If this be so, it follows as a consequence, that if the principal would be entitled to his discharge, if rendered, the Court would relieve the bail without rendering. No objection can arise from the fact of this being bail upon habeas corpus, because without that writ, the defendant would be unable to bring the cause before this Court; which became necessary, the Court below having refused a similar application to the present.

ABBOTT, C. J.—My opinion in this case is founded upon the particular circumstances which have been disclosed on both sides, and I think the bail ought not to be exonerated. The arrest was not by process out of this Court, but of another, and we must suppose that the Judge of that Court might, by law, order the party to be holden to bail. The defendant then chooses, of his own act, voluntarily to remove the case from that Court into this, with the knowledge, that if he does so, one of the terms upon which he is allowed to remove it is, that he shall give bail in this Court to answer

(a) 2 Barn. & Ald. 234. (b) Ante, vol. i. 79.

1822.

SARD v. FORREST.

for the debt. As that is an act of his own, and which he is not obliged to do, I think we ought not to relieve him on motion. In the first instance, he treats the bail as valid, and he is not to be allowed to blow hot and cold, and now say that they are null.

BAYLEY, J.—I am of the same opinion. The objection to the arrest now comes too late. It has been decided as a general principle, that if a party puts in and perfects bail, he cannot complain of the arrest. That was laid down in *Norton* v. *Danvers* (a).

HOLROYD, J.—Concurred.

BEST, J.—I am of opinion, that if the defendant was liable to be arrested in the *Palace Court*, there is no reason why he should be in a better situation by the removal of the cause into this Court. If persons of this description are to be protected from arrest, I think it would be much better if they were to apply in the first instance to the Lord Chamberlain.

Rule discharged, with Costs.

(a) 7 T. R. 375.

Thursday, Nov. 28.

SAUNDERS v. OWEN.

Plaintiff declared de bene esse, and defendant pleaded in abatement before he had put in and perfected special bail; and the plaintiff, treating his plea as a nullity, signed interlocutory judgment, which was held regular.

THE plaintiff having declared de bene esse, and demanded plea, the defendant pleaded in abatement within the four days allowed him, but at that time had not put in special bail: he did afterwards put in and perfect special bail, and notwithstanding this, the plaintiff treated his plea as a nullity, and signed interlocutory judgment.

1822.

SAUNDERS v. OWEN.

Reader moved to set aside the interlocutory judgment, and contended, that the demand of a plea waived the bail, and that the time when the bail was put in and perfected, must have reference to the day when it ought to have been put in, by the rules and practice of the Court.

Walford contrà, urged, that the defendant could not be considered as in Court, until bail had been put in and perfected, and therefore he could not take advantage of any premature step of the plaintiff, until he was himself in Court.

The Court was of this opinion; and held, that the interlocutory judgment was regularly signed.

Rule discharged, with Costs.

WYLLIE v. JONES.

Thursday, Nov. 28.

Where it appeared after bail had justified, that money had been given to one of them for his trouble and loss of time in coming up to justify, the Court did not set aside the allowance, but imposed upon the defendant the terms of producing an affidavit of merits, bringing the sum sworn to into Court, and taking short notice of trial.

THIS was a motion to set aside the allowance of bail, on a suggestion by affidavit, that one of the bail was to receive a guinea from the defendant or his attorney, for his trouble, loss of time, and refreshment, in coming up to justify, as appeared from a conversation between the parties after the bail had justified.

The Court said it was a dangerous thing to allow persons becoming bail, to receive money under pretence of being remunerated for their trouble and loss of time, because, whether they passed or were rejected, the trouble was the same. Such a practice held out a great temptation to per-

1822.

WYLLIE v. JONES.

sons to commit perjury; and therefore, on account of the evil effect which such an example might produce, the rule could be discharged only upon the terms of producing an affidavit of merits, bringing the sum for which the bail justified into Court within a week, and taking notice of trial for the first Sittings in next Term, the costs of this application to be costs in the cause.

Walford, for the plaintiff; *Adolphus*, for the defendant.

Rule discharged, on the terms mentioned.

END OF MICHAELMAS TERM.

INDEX TO THE CASES,

ARGUED AND DETERMINED IN

MICHAELMAS TERM,

IN

THE THIRD YEAR OF GEORGE IV. 1822.

VOL. II. PART I.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

HILARY TERM,

IN THE THIRD AND FOURTH YEARS OF THE REIGN OF GEORGE IV.

1823.

Thursday, Jan. 23.

WAYDE *v.* Lady CARR.

In case, for negligent driving, the law or usage of the road is not the criterion of negligence. Therefore where defendant's carriage was on the wrong side of the road, and in attempting to pass on the near instead of the off side, plaintiff sustained damages: Held, that it was for the Jury to decide the question of negligence, without regard to the law of the road.

CASE for the negligence of the defendant's servant, in driving her carrriage against a gig of the plaintiff, whereby he was thrown out and injured in his person. Plea, Not Guilty, and Issue thereon. At the trial before *Abbott*, C. J. at the *Middlesex* adjourned Sittings after last Term, the Jury found their verdict for the defendant.

Gurney now moved for a rule to shew cause why the verdict should not be set aside and a new trial granted, and he relied upon the fact proved in evidence, that at the time of the accident the defendant's carriage was on the wrong side of the road, and that the coachman had attempted to pass a hackney coach which interposed between his mistress's carriage and the plaintiff's gig, on the near instead of the off side, contrary to the universal law and usage of the road, whereby the alleged injury was sustained by the plaintiff.

1823.

WAYDE v. Lady CARR.

The Court however said, that whatever might be the law of the road, it was not to be considered as inflexible and imperatively governing a case of this description. In the crowded streets of a metropolis, where this accident happened, situations and circumstances might frequently arise where a deviation from what is called the law of the road would not only be justifiable but absolutely necessary. The question in this case was a question of negligence. Of this the Jury were the best judges, and, independently of the law of the road, it was their province to determine whether the accident arose from the negligence of the defendant's servant. They had acquitted him of negligence, and having all the circumstances of the case before them, had found their verdict for the defendant; and therefore there was no ground for this application.

Rule refused.

Thursday, Jan. 23.

Lady BRANSCOMB v. BRYDGES and Another.

Case is a good form of action for an excessive distress for rent, though the tenant has tendered the rent to his landlord before the distress is levied.

CASE for an excessive distress for rent. Plea, Not Guilty. At the trial before *Abbott*, C. J. at the *Middlesex* adjourned Sittings after last Term, it appearing in evidence, that before the distress was levied the plaintiff made a tender of the rent in arrear, it was objected on the part of the defendant that the plaintiff had misconceived her form of action, and that she ought to have brought trespass, inasmuch as the tender was in the nature of a notice, and the defendant, in taking the goods after the tender, was a trespasser. The learned Judge, however, over-ruled the objection, and the plaintiff had a verdict, with liberty to the defendant to move to enter a nonsuit.

Copley, S. G., now moved accordingly, and contended that the plaintiff ought to have declared in trespass, and

1823.

BRANSCOMB v. BRYDGES.

not in case. Supposing the defendant, having legally entered, had taken an excessive distress, he might be liable in case for the consequential damage; but, after the tender of the rent, his entry was illegal, and therefore he could be treated only as a trespasser.

The Court however said, that the action was well enough laid, and that the fact of the tender of rent was no defence for the defendant. The plaintiff was at liberty to waive the trespass if she thought proper, and bring case for the excessive distress. Whether the defendant entered legally or illegally made no difference in the case; it was sufficient to sustain the action that he had taken more goods than were necessary to satisfy his claim. The plaintiff had her option to bring either case or trespass.

HOLROYD, J., mentioned, that in *Pitts* v. *Gaince* (*a*), where the master of a ship brought case for unlawfully taking his ship, the Court held, that though he might have brought trespass for the forcible dispossession, yet he might waive the trespass and sue the defendant to recover damages for the loss of the benefit which would have arisen to him from the voyage.

Rule refused (*b*).

(*a*) 1 Salk. 10.

(*b*) Vide 32 Hen. 3. c. 4. 51 Hen. 3. c. 4. 2 Stra. 851. 3 Lev. 48. 1 Burr. 582. 1 H. Bla. 13. 9 East, 298. and Palmer, 47.

1823.

Thursday, Jan. 23.

The KING *v.* THOMAS POYNDER the elder.

A person occupying a house in one parish by means of a clerk only, and paying rent, rates, and taxes, but sleeping in another parish, is a *substantial householder*, and liable to serve the office of overseer of the poor in the first mentioned parish.

INDICTMENT against the defendant for refusing to take upon him and execute the office of overseer of the poor of the parish of *St. Ann, Blackfriars*, in *London*, to which he had been lawfully nominated by two Justices of the peace. Plea, Not Guilty, and Issue thereon. At the trial, before *Abbott*, C. J. at the *London* adjourned Sittings, after last Term, it appeared in evidence that the defendant occupied a dwelling-house, yard, buildings, and premises in *Earl Street*, in the parish of *St. Ann, Blackfriars*, to which he and his partner in trade, as lime merchants, were rated to the relief of the poor, and were liable to all other taxes levied on housekeepers. The only person who slept upon the premises was the managing clerk or agent conducting the business of the firm, and he resided in the dwelling-house attached to the premises. The defendant and his partner resided entirely in the country, distant from the parish in question, and resorted to the establishment in *Earl Street* for the purposes of business only. It was proved, that the defendant had exercised the privilege of a householder by voting at the election of the rector, who, by custom, is chosen by the inhabitant householders of the parish in question. Under these circumstances the question was, whether the defendant was a substantial householder within the meaning of the statute 43 *Eliz.* c. 2, and the several other statutes relating to the appointment of overseers of the poor. The learned Judge reserved the question, and a verdict of Guilty was recorded, subject to the opinion of the Court as to the defendant's liability to serve the office.

Denman, C. S., now moved for a rule to shew cause why the verdict of guilty should not be set aside, and a new trial

1823.



REX v. POYNDER.

granted. In order to cast upon the defendant the liability of serving the office of overseer, it must be distinctly shewn that he is a substantial householder, domiciled in the house in respect of which he has been appointed to serve. If these qualifications be necessary to satisfy the definition of a substantial householder, it is quite clear that this defendant is not liable, the fact being that he resorted to the lime wharf and premises connected with it, merely for the purposes of his trade, and never slept upon the premises in his life. After the case of *Rex* v. *Hall* (a), decided last Term, there is certainly some difficulty in establishing the proposition now contended for, because, if the Court should be of opinion that a non-resident householder, who enjoys the privileges resulting from that character, must also bear the burthens attached to it, this case must be governed by that decision. But the inconvenience which such a decision would produce must be so obvious, that the Court will pause before they pronounce that this case must be governed by *Rex* v. *Hall*. In that case the question was, whether a householder paying rent, rates, and taxes, and resident only by his partners or servants, might give his vote at the election of the registrar and clerk of a Court of Requests. The Court, referring in that case to the policy of the court of Requests' Act, certainly held, that a householder, under such circumstances, was privileged to vote for such an office. But here a very different principle must govern their decision. They must look to the nature and character of the office of an overseer of the poor. Looking through the whole of the poor laws, residence seems to be considered as an essential requisite to qualify persons to fill that office, and for this reason, that they may be acquainted with the affairs of the parish, and conversant with its interests. The legislature never could intend that this burthensome office should be imposed upon a man who happened to be the tenant of a house in a parish, but personally resident in a

(a) Ante, p. 241.

1823.

Rex v. Poynder.

different parish. If mere tenancy was the criterion, this defendant might be called upon to serve the office in every parish in which he happened to be the holder of premises; and this absurdity would follow, that he might be appointed to the same office in two parishes during the same year. The case against the defendant cannot be carried farther by the late statute 59 *Geo.* 3. c. 12. s. 6, because the facts do not bring it within the operation of that clause. By that statute it is enacted, that "a person who shall be assessed to the relief of the poor of any parish, and shall be a resident within two miles from the church or chapel of such parish, may be appointed to be an overseer of the poor thereof, although such person so to be appointed shall not be an householder within the parish of which he shall be so appointed an overseer of the poor." The object of that statute clearly was no more than to impose the liability upon persons assessed to the relief of the poor, though not householders, provided they dwelt, even as lodgers, within two miles of the church or chapel. The defendant certainly does not fall within the scope of that statute, because his personal residence is more than two miles from the church of *St. Ann, Blackfriars.* The duty which an overseer is called upon to discharge is of a personal nature, and cannot be performed by deputy, and therefore necessarily imports personal residence. The only question then is, whether the defendant, who is alleged in the indictment to be an householder and residing within the parish of *St. Ann*, is, under the circumstances of the case, to be deemed so to be, within the purview and true intent and meaning of the statutes relating to the appointment of overseers. The word "householder" does not appear by any of the adjudged cases on this subject to have been judicially defined, but both ex vi termini, and by its common acceptation, it clearly signifies a "house-dweller, housekeeper, or person inhabiting a house as his regular domicile." Dr. *Johnson* defines it to be "a master of a family." *Bayley* interprets

it "master of a house or family." The defendant certainly does not answer this description. As far then as etymology goes, the defendant is not a substantial householder, and therefore the Court must look to the reason of the thing, in order to decide the question of his liability to serve the office sought to be imposed upon him by this prosecution. As far as the authorities go, they seem to consider residence as an essential qualification. For instance, it is said in *Gibson's Codex*, upon the subject of the office of churchwarden, "that no person living out of the parish, although he occupies lands within the parish, may be chosen churchwarden (who by the 43 *Eliz.* c. 2. is declared to be an overseer), because he cannot take notice of absences from church, nor disorders in it for the due presentment of them." In the case of *Rex et Reg.* v. *Moore* (*a*), the defendant, who was a citizen of *London*, having a country house at *Hornsey*, where he usually dwelt in the summer season, was chosen overseer of the parish of *Hornsey*, and being discharged on appeal to the Quarter Sessions, the order for such discharge, and for choosing another in his stead, was removed by certiorari into this Court, when the Court confirmed the order, and added, that they discountenanced a parish choosing a man to be overseer, who was resident there only part of the summer, and who was actually an inhabitant of a parish in *London* (*b*). From this it should seem that personal residence is necessary to constitute a man a householder within the meaning of the statute. Another test of this definition may be resorted to in considering whose dwelling-house this could be laid to be in cases of felony. It seems to be quite clear, that it could not be described as the dwelling-house of the defendant, but must be laid to be that of the clerk, who slept in it. For this, *Rex* v. *Rogers* (*c*), *Tracey* v. *Talbot* (*d*), *General*

(*a*) Carth. 161.

(*b*) Vide Com. Dig. Vol. iv. tit. Justice of Peace, B. 64. Hammond's edit. where this authority is recognised as law.

(*c*) 1 Leach. Cro. Cas. 89. S. C. 2 East, 506.

(*d*) 2 Salk. 532.

1823.

REX v. POYNDER.

Gansel's case (*a*), *Canoll's* case (*b*), *Turner's* case (*c*), *Trapsham's* case (*d*), are authorities. The case of *Rex* v. *Margetts and others* (*e*), is precisely in point upon this part of the case, for there the Court were clearly of opinion that if a burglary be committed in the warehouse of a trading company, in the house belonging to whom an agent of the company resides with his family, for the purpose of conducting the business, it may be laid to be the dwelling-house of the agent, although the rent is paid, and the lease is held by the company; and they said it would be doing an equal violence to language and to common sense to consider it as *their* dwelling-house, especially as it was evident that their only object in holding it was, to furnish a residence for their agent, and ware-rooms for their commodities; that the punishment of burglary was intended to protect the actual occupant from the terror of disturbance during the hours of darkness and repose, but that it would be absurd to suppose that that terror, which is the essence of the crime, could, from the breaking and entering in that case, have produced an effect at *Witney*, in *Oxfordshire*, where the company resided (*f*). These authorities therefore go to shew, that in the case of an indictment for burglary, the defendant's clerk would be considered as the householder, and consequently that the law contemplates an actual and not a constructive

(*a*) Cowp. 4.

(*b*) O. B. February, 1782.

(*c*) O. B. February, 1784.

(*d*) O. B. August, 1786.

(*e*) 2 Leach. Cro. Cas. 930.

(*f*) In that case reference is had to the case of *Rex* v. *Stock* and *Edwards*, at *Carlisle* Summer Assizes, 1809, and also to the note of a case of burglary in *Haberdasher's Hall*, *London*, inhabited by Mr. *Knapp*, clerk to the *Haberdasher's Company*, in which latter case the Court held it to be Mr. *Knapp's* house. These decisions were recognised at *Hertford* Summer Assizes, 1822, in *Rex* v. *Joseph Giffin*, who was indicted for a burglary in a house on the *Stort* Navigation, at *Cheshunt*, the property of the trustees of such navigation, occupied by the prosecutor, as their sluice-gate-keeper. It was objected for the prisoner, that the house could not be laid as the dwelling-house of the prosecutor, he being merely the servant of the trustees, and liable to be turned out at a moment's notice; but *Park*, J., over-ruled the objection, on the authority of the cases above mentioned, and the prisoner was convicted. MS.

possession and residence. This case is not to be considered with reference to the custom of *London*, but the Court are to decide whether the defendant is a householder within the meaning of the act of Parliament. They must construe this with a view to the intention of the Legislature at the time the statute was passed, and cannot put a forced construction upon this question, which a change of times and circumstances in the occupation of houses in *London* by trading companies, might induce. If this defendant is not a substantial householder within the meaning of the statute of *Elizabeth*, and the subsequent statutes, he is clearly not liable under this indictment (*a*).

Abbott, C. J.—The question raised in this case was brought under our deliberate consideration in the case of *Rex* v. *Hall*, and I may venture to say, that when we conferred together upon that occasion, we were not insensible to the distinction attempted to be drawn between the privileges and burthens attached to the character of householder. We thought that such a distinction could not be established; for we were clearly of opinion, that as the parties interested were liable to the burthens entailed upon them in respect of their occupation as householders, they had also a right to enjoy the privileges which such an occupation conferred upon them. That principle applies to the defendant in this case. This defendant, though he did not reside in the parish of *St. Ann*, yet, as a householder, he enjoyed the privilege of voting for the rector of that parish, who is, by custom, chosen by the inhabitant householders. Therefore, as he enjoys the privileges, I am of opinion that he is liable to the burthens of a householder, and consequently is bound to serve this office. My mind is so well satisfied upon the

(*a*) Vide 14 Eliz. c. 5. 18 Eliz. c. 3. 39 Eliz. c. 3. 43 Eliz. c. 2. 54 Geo. 2. c. 91. and 59 Geo. 2. c. 12. *The Queen* v. *Searle*, 1 Bott. 3. 4. *Rex* v. *Weobley*, in *Herefordshire*, 2 Stra. 1261. 1 Nol. P. L. 49. See also the cases decided upon this subject in the Ecclesiastical Courts, collected in 1 Haggard's Consistory Reports, 368, et seq.

1823.

Rex v. Poynder.

point that I think there is no necessity for farther discussion.

Bayley, J.—I am of the same opinion. No objection can arise from the circumstance of the defendant being an inhabitant householder in another parish, and certainly no prejudice can be sustained by him in that respect from his liability to serve the office there; because, suppose he should happen to be appointed to the office in the two parishes during the same year (which is not very likely), he might appeal against the order, and he would then be put to his election in which parish he would serve. He cannot serve in both at once, but he may serve in each successively. The question here is, who is the tenant of the house. The defendant clearly is the tenant, and therefore he is a householder, and answers the description of a *substantial* householder. If gentlemen of fortune and wealth, and who can afford to reside at a country house, and at the same time occupy a warehouse in *London* merely by a clerk or servant, are to be exempted from parish offices, a great hardship will be imposed upon the unfortunate few who cannot keep their country houses, but are obliged to remain inhabitants of the city. A very large number of houses in this great metropolis are merely occupied by clerks or servants, but that is no reason why their owners should not be called upon to discharge those duties which fall upon other householders.

Holroyd, J. and Best, J. concurred.

Rule refused.

1823.

REX *v.* The INHABITANTS of COTESBATCH.

Friday, Jan. 24.

This Court will not entertain an application for setting aside an award, founded upon an indictment at the Assizes for not repairing a road, though the question in dispute be of a civil nature.

THESE defendants were indicted at the last Assizes for the county of *Leicester*, at the instance of another parish, for not repairing a road in the parish of *Cotesbatch*, in that county. The defendants withdrew their plea of Not Guilty, and pleaded Guilty, subject to the award of arbitrators indifferently chosen upon the question of their liability to repair; and the arbitrator having decided that they were liable, and made their award to that effect,

G. Marriott now moved for a rule to shew cause why the award should not be set aside for certain objections appearing on the face of it; and contended, that though this was in form a criminal proceeding against the defendants, still it was in substance a civil suit, intended only to establish a civil right. The object of the motion was not to affect the form of the indictment, but merely to bring under the consideration of the Court the award of the arbitrators; but

The Court said, they had no authority over the order of a Court of oyer and terminer and general gaol delivery. This was a proceeding in form criminal, and the case had been dealt with at the Assizes in a manner which seemed best adapted to meet the justice of the case, and this Court had no power to interfere with the order of the Judge at the Assizes. If the defendants were aggrieved by any thing done by the arbitrators, their application for redress must be made in the Court below. Supposing this to be a matter of civil right, still it must come before the Court in a shape in which they had authority to interfere. Unless the case was within 9 & 10 *W.* 3. c. 15, the Court had no jurisdiction over the award.

Rule refused.

1823.

Friday, Jan. 24.

PORTER v. PITTMAN.

Defendant was arrested and held to bail for 17*l.*, and paid 3*l.* into Court, which plaintiff took out and stayed proceedings:—Held, that defendant was not entitled to costs under stat. 43 *Geo.* 3. c. 46. s. 3.

THE defendant was holden to bail for 17*l.*, and paid 3*l.* into Court, which the plaintiff took out, and thereupon stayed all further proceedings; and

Osborne now moved, upon the statute 43 *Geo.* 3. c. 46. s. 3. for a rule on the plaintiff to shew cause why the defendant should not have his costs taxed under the circumstances stated; but

The Court, acting upon the authority of *Ruveroy* v. *Alefson* (*a*), and *Butler* v. *Brown* (*b*), held, that this was not a case within the statute, this not being money *recovered* within the meaning of the act of Parliament.

Rule refused (*c*).

(*a*) 13 East, 90.

(*b*) 1 Brod. & Bing. 66.

(*c*) Vide *Laidlaw* v. *Cockburn*, 2 New Rep. 76. Hullock on Costs, 2d edit. 132. 1 Smith. Rep. 428. 2 Id. 667; and *Cammack* v. *Gregory*, 10 East, 525.

Saturday, Jan. 25.

PRINCE v. CLARK.

A. ships goods to *India*, and in his letter of instructions to his agent *B.*, directs him to invest the proceeds in certain specified articles of merchandize, *or in bills at the exchange of the day*, and remit them to *England*. *B.*, instead of complying with his orders, invests the proceeds in a commodity not specified in his letter of instructions, and transmits a bill of lading for the same, which reaches *A.* on the 29th *May*, who notifies to an agent of *B.*, on the 7th *August*, his dissent from what has been done, the goods having in the mean time been lost at sea:—Held, that the laches of *A.* in delaying his notice of abandonment so long, discharged *B.*'s liability.

ASSUMPSIT for money had and received by defendant to plaintiff's use. Plea, non assumpsit and issue thereon. At the trial before *Abbott*, C. J. at the *London* adjourned Sittings after last Term, it appeared in evidence, that in the

month of *May*, 1821, the plaintiff, a slop seller in *London*, having determined to make a shipment of a quantity of cloth to *Calcutta*, employed the defendant and his partner, named *Coffin*, since deceased, for the purpose of selling the property for his account. The defendant was master of the ship *Ajax*, on board of which the goods were shipped. In the plaintiff's letter of instructions, he informed the defendant and his partner of the shipment, and desired that the goods should be disposed of as opportunity offered, at any place which they might think best calculated to promote his interests, and further desired the returns to be made for the proceeds of the shipment, in indigo, if it could be bought at a moderate price; or silk, if from ten to twelve shillings per pound, good and clear; or those articles marked with a cross, in the price current accompanying the letter, or those marked with two crosses, which were most desirable, if to be procured at a low price; concluding as follows:—"If neither of the before-mentioned articles are to be bought with a good prospect of a profit, you will then *buy bills at the exchange of the day*." The *Ajax* arrived at *Calcutta* in safety with her cargo. On the 17th *January*, the defendant and his partner wrote the plaintiff to the following effect:—

"We beg to inclose a bill of lading for 250 bags of *Benares* sugar, we have shipped on board the *Fame*, on your account, value sicca rupees,   for your guidance. We have been induced to make this shipment in consequence of the very low state of the exchange, as we could not get any thing better than 1*s.* 11*d.* per rupee, and we sincerely hope this sugar will make a better remittance than that rate. Your shipment of cloth we got rid of with very great difficulty, at prime cost less the charges of freight, and insurance, which are never allowed. The several articles referred to in your letter of instructions, were not to be obtained at prices within 25 per cent. of any thing like the price current prices.

"We remain, &c."

1823.

PRINCE v. CLARK.

This letter reached the plaintiff on the 29th of *May*, 1822, but he took no notice of it until the 7th of *August*, when he sent a notice by his attorney, to a Mr. *Leigh*, supposed to be the agent in *London* of the defendant and his partner, to the following effect:—

"On the part of Mr. *John Prince*, I beg leave to inform you, as the agent of Messrs. *Clark* and *Coffin*, that as they were not authorized by him to invest the property committed to their care in the purchase of sugar, he will not accept it, but hold them liable for the amount produced by the sale of his goods. You will therefore, if you think proper, either insure the sugar in question, in the names of Messrs. *Clark* and *Coffin*, or for the benefit of the person who may be ultimately entitled thereto."

In reply to this letter, Mr. *Leigh* stated, that he knew nothing of the transaction in question, and being only private agent of Messrs. *Clark* and *Coffin*, he declined any interference in the matter. On the 14th of *June*, in the same year, the ship *Fame* was lost at the *Cape of Good Hope*, when the defendant's partner was drowned. Under these circumstances, the question was, whether the defendant was liable for the amount of the proceeds of the original shipment.

On the part of the plaintiff it was contended that the defendant had departed from his letter of instructions, in remitting a commodity not mentioned in those instructions, and that he was bound to send either the investment mentioned in those instructions, or at all events, bills of exchange according to the exchange of the day. This he had not done, and therefore the plaintiff was entitled to a verdict. On the other hand it was insisted, that the laches of the plaintiff in waiting from the 29th of *May*, when the bill of lading of the sugar had arrived, until the 7th of *August*, before he gave any notice of abandoning the sugar, absolved the defendant from all liability. The learned Judge was of

opinion that the plaintiff was not bound to accept the sugar, and that when he received the bill of lading, it was competent to him to have rejected it, but that his dissent ought to have been notified within a reasonable time after he was informed that his letter of instructions to the defendant had not been complied with. It was for the Jury however to determine whether the plaintiff had given such reasonable notice, and had been sufficiently prompt in the repudiation of the investment in sugar. The Jury found their verdict for the defendant.

Scarlett now moved for a rule to shew cause why the verdict should not be set aside, and a new trial granted. He contended, in the first place, that the reasonableness of the notice in this case, was a question of law, and not a question of fact; and in the second, that Mr. *Leigh* was not such an agent of the defendant as required that he should have received notice, and consequently the defendant being abroad, there was no person in this country acting on behalf of the defendant to whom notice could be given.

ABBOTT, C. J.—I have no doubt, that when the plaintiff received the letter from the defendant and his partner, inclosing the bill of lading of the sugar in question, he was not bound to accept it, being a purchase contrary to the letter of his instructions; but at the same time I am of opinion, that he ought to have notified his dissent from what had been done on his behalf, within a reasonable time after the bill of lading had arrived, if there was any person in this country, acting for the defendant, to whom such a notification could be given. It was clearly proved that Mr. *Leigh*, was a person of that description, he being the private agent of the defendant. On the 29th of *May*, the bill of lading arrives, but no notice of dissent is given until the month of *August* following. The Jury were of opinion, that this was an unreasonable delay, and I have no reason to

1823.



PRINCE v. CLARK.

find fault with their verdict. I think the plaintiff ought to have given immediate notice of his dissent, there being a person in this country to whom such a notice could be given. If an agent does not conform to the instructions of his principal, and the principal, with a consciousness that his instructions have been disobeyed, neglects to secure himself, I think he must be bound by his own laches.

BAYLEY, J.—An agent, though he does not act conformably to the strict letter of his instructions, may, under certain circumstances, be acting according to what he conceives to be, for the benefit of his principal. This observation is peculiarly applicable to the case of an agent who is called upon to act in a distant country, having no facility of communication with his principal. He is on the spot and acts under circumstances of which the principal can form no adequate judgment. If an agent deviates from his instructions, the principal has a right, as soon as he knows of the deviation, to repudiate what has been done, but if he does not mean to accede to what has been done, he is bound immediately to take steps to notify his dissent. He has no right to wait for the fluctuations of the market, in order to see whether the investment is likely ultimately to turn out beneficially for him. I think he has no right to pause an unreasonable length of time, before he gives notice, provided there is any person to whom he can signify his dissent. In this case, the intelligence arrived on the 29th of *May*, informing the plaintiff that his orders had been disobeyed, and that the proceeds of the outfit had been laid out in sugar, which might turn out a beneficial shipment. Undoubtedly he had then a right to repudiate what had been done, and hold the defendant liable for the neglect of his duty. Take it, that he did not know, whether there was or was not an agent of the defendant in this country, still he might have made some enquiries upon the subject before the month of *August* following. In that month, he sends a

1823.

PRINCE v. CLARK.

notice to Mr. *Leigh*, having discovered that there is some connexion subsisting between him and the defendant. It was competent to him to have applied to that person much sooner. I think, therefore, that the plaintiffs' neglect to make any application for the purpose of discovering who the defendant's agent was, from the 29th of *May*, to the 7th of *August*, was good evidence to go to the Jury, to induce them to come to the conclusion which they have formed, and that consequently there is no ground for disturbing the verdict.

HOLROYD, J. and BEST, J. concurred.

Rule refused.

J. B. CATHERWOOD and another, Administrators, &c. v. CHABAND.

Saturday, Jan. 25.

A. dies intestate; *B.* his wife, takes out administration and dies before his effects are fully administered. *C.* takes out administration de bonis non, and sues *D.* as acceptor of a bill of exchange indorsed to the administratrix, in payment of a debt due to the intestate:—Held, that the action was well brought by the administrator de bonis non.

To such action defendant pleaded an agreement, whereby all his creditors had consented to accept an assignment of certain debts and credits in full satisfaction of all their demands. Replication denied that all the creditors had signed such agreements, upon which issue was joined:—Held, that the affirmative of such issue lay upon the defendant.

ASSUMPSIT by the plaintiffs as administrators de bonis non, of *Joseph Catherwood*, deceased, (with profert of the letters of administration) upon two bills of exchange for 76*l.* 7*s.* each, drawn by *Joseph Catherwood* the younger, upon and accepted by the defendant, and indorsed by the drawer, to one *Sarah Catherwood*, deceased, administratrix of the intestate, and by her left unadministered. Plea, 1st. Non-assumpsit. 2d. That it was agreed by and between plaintiffs, as such administrators, and certain other persons, respectively, creditors of defendant, of the one part, and defendant of the other part, that certain credits and effects of the latter should be assigned over by him to two of his creditors, upon trust, to pay and divide the same amongst all his creditors, and in case the money to be realized therefrom should not be sufficient to pay the full amount of his debts,

1823.

CATHERWOOD *v.* CHAPAND.

then the deficiency should be made good by a promissory note of 250*l.* to be given by defendant, payable at the time mentioned in the plea, and that the creditors of defendant had joined in such agreement, and that in pursuance thereof defendant had assigned the said credits and effects, and delivered the promissory note in the said agreement mentioned. And, 3d. A like plea, with an averment that defendant was ready and willing, after such agreement had been entered into, to assign the said credits and effects upon the trust aforesaid, and to make such promissory note; and that after the making of the said agreement plaintiffs, as such administrators, had wholly discharged defendant from assigning said credits and effects, and making said promissory note. Replication to the first plea, a similiter, and to the second and third severally and respectively, that all the defendant's creditors had not joined in the agreement in those pleas mentioned, upon which issues were joined.

At the trial before *Abbott*, C. J., at the *London* adjourned Sittings after last Term, the case was this:—*Joseph Catherwood*, the deceased, had carried on trade in co-partnership with his son *Joseph Catherwood* the younger, and on the death of the intestate, his widow took out letters of administration of his estate and effects. At the time of the intestate's death, the defendant was indebted to him and his son in a sum of 152*l.* 15*s.* 6*d.*, for which *Joseph Catherwood* the younger drew the bills of exchange in question for two equal payments, which were accepted by the defendant, and indorsed by the younger *Catherwood*, to his mother, as administratrix of his father, in part payment of what was due to the father from the partnership effects. When the bills in question became due, they were dishonoured, and before Mrs. *Catherwood* could enforce payment by legal process, she died, leaving a will, whereby she appointed executors, by whom the bills in question were delivered over to the plaintiffs, (other sons of the intestate) who had obtained, upon the death of their mother, administration de bonis

1823.

CATHERWOOD v. CHABAND.

non of their father's effects left unadministered. In support of the defendant's pleas, a list of his creditors who had agreed to sign the agreement mentioned in the pleas, was put in, but there was no proof that all these creditors, had signed such agreement. It was contended, on behalf of the defendant, that this action ought to have been brought by the executors of Mrs. *Catherwood*, the administratrix of the intestate, and not by the plaintiffs, as administrators de bonis non, according to the authority of several decided cases, but the learned Judge over-ruled the objection, and the plaintiffs had a verdict, with liberty, however, to the defendant to move to enter a nonsuit.

Copley, S. G., now moved accordingly, and made two points, first, that the parties to the action were misconceived, and that it ought to have been brought by the executors of the original administratrix, and not by the administrators de bonis non, for which he cited *Barker* v. *Talcot* (a), *Yates* v. *Gough* (b), and *Betts* v. *Mitchell* (c); and, second, that as the issue lay upon the plaintiffs to prove that all the creditors of the defendant had not executed the agreement pleaded, and as there was no evidence to negative the pleas, they must be taken as a sufficient answer to the action.

A third ground was taken, namely, that though the plaintiffs had made profert of the letters of administration, they were not produced in evidence; but as it was conceded that the letters of administration were in existence, and might have been produced,

The Court was clearly of opinion that the omission to give them in evidence was not a ground for disturbing the the verdict. Upon the remaining points,

ABBOTT, C. J., said, I am of opinion that neither of

(a) 1 Vern. 473.

(b) Yelv. 33. S. C. Cro. Jac. 4. and S. C. Moore, 680.

(c) 10 Mod. 316.

1823.

CATHERWOOD v. CHABAND.

these grounds is tenable. As to the second objection, I thought at the trial, and I am still of the same opinion, that the affirmative of the special pleas pleaded lay upon the defendant, and for this reason, that the plaintiff cannot know who the creditors of the defendant are, inasmuch as they, in their character of administrators, are strangers to the defendant's creditors. It was incumbent on the defendant to make out his pleas by shewing, that all the creditors were parties to the agreement, because he was the person best capable of proving who his creditors were. If we were to hold otherwise, we should be calling upon the plaintiffs to prove a negative. That objection therefore is completely answered. Upon the other, which was the more important and general point, I thought at the trial, and I still think, that inasmuch as it was clearly established that these bills of exchange had been indorsed to the administratrix Mrs. *Catherwood*, in payment of a debt due to the estate of her husband, and as she took them in the character of administratrix, in her hands they were assets. If the money had been paid to her, it is clear she must have accounted for it to the estate of her intestate; but the money not having been paid, and the bills having remained in her hands, she still held them as part of the estate of her deceased husband unadministered. These bills being then part of the estate of her deceased husband, they devolved legally upon the persons who afterwards became representatives of the deceased; and, consequently, the plaintiffs, who had obtained the second administration, had a right to sue. This case is distinguisable from *Barker* v. *Talcot*, because there the bill was paid to the executor of the first administrator, which was a good excuse to the person paying, because he might not know that there ever would be another administrator, so that such a payment might fairly operate in his discharge; and it would have been extremely hard to make him liable to pay the same money twice. The only question in this case is, in whom the right of action is. It

must be a matter of perfect indifference to the defendant, to whom he is liable, because he can be liable but once. He sustains no prejudice by being sued by the administrators de bonis non. But the modern cases upon this subject are quite decisive of this question. The case of *Hirst* v. *Smith*(a) establishes this proposition, that if a promise is made to the personal representatives of an intestate, the administrator de bonis non may sue upon it in his character of administrator, and may join such a cause of action with counts upon promises made to the intestate in his life-time. If then the personal representative of the intestate may sue in the character of administrator, and he dies before the effects are fully administered, the right to sue upon such a promise would devolve upon the new representatives of the intestate, and not to the representatives of the original administrator. There is such a privity between administrators de bonis non, and the first administrator, that they may sue upon a promise made to him, and this case falls precisely within that principle, and consequently these plaintiffs have a right to maintain this action.

BAYLEY, J.—I am of the same opinion. I think this action is well brought in the names of the plaintiffs as administrators de bonis non of the intestate. This money is applicable to the payment of the debts of the intestate, and if we were to hold that it would go to the executors of the first administrator, it would become assets applicable to the payment of her debts, which would be most unjust, as respects the interests of those who have a claim upon the property of the intestate. This case must be governed by the modern decisions, and not by those which have been cited in support of the first objection. As to the second objection, I think that the agreement which has been pleaded is only to be considered as an agreement in fieri, and as a proposal only, which is to be binding only in case

(a) 7 T. R. 182.

1823.

CATHERWOOD v. CHARAND.

it is signed by the parties included in it. The pleas profess to state that the whole of the creditors of the defendant had joined therein. That averment is to be taken most strongly against the pleader, and it lies upon the defendant to prove that the plaintiff and all the other creditors had joined in it, which does not appear to have been established, and therefore the pleas fall to the ground.

HOLROYD, J.—I think we must decide this case upon the principle which has been adopted in the modern cases, namely, that where the money recovered by the administrator would be assets of the deceased, he might sue in his representative character, although the promise was made to him personally, and might also join therein other causes of action. That has been established in a variety of cases; and therefore the old authorities, as far as they go to support the objection which has been taken, must receive that qualification, and are not to be considered as binding upon the Court in the decision of this case. As to the second objection, I think the onus lay upon the defendant to prove, as he insists in his plea, that all the creditors had executed the agreement.

BEST, J.—I am of opinion, that as these bills of exchange were part of the property of the intestate left unadministered by the administratrix, the right to sue upon them vested in the administrators de bonis non; for otherwise we should be holding that they would form part of the estate of the administratrix, disposable by her executors, which is a proposition which cannot be sustained. I think the case of *Hirst* v. *Smith* is not distinguishable from this; and upon the principle there laid down, there is no foundation for this objection. With respect to the other point I perfectly concur with the other members of the Court.

Rule refused.

1823.

CARNEGIE v. WAUGH.

Monday, Jan. 27.

Where A. and B., tutors dative appointed by a Scotch court as guardians of an infant, executed for and on his behalf a tack or agreement, inter partes, for a lease, whereby a salmon fishery, in Scotland, was demised to C. for four years, at a certain rent, covenanted to be paid to the infant:—Held, that the infant might maintain an action of debt, in his own name upon the agreement, to recover arrears of rent, though he was no party to the agreement, nor proved to be of full age at the time of action brought.

DEBT upon a *Scotch* tack, or agreement for a lease, to recover the amount of one year's rent of a salmon fishery, in *Scotland*, thereby demised to the defendant. The tack was dated 21st of *October*, 1820, and was in these words:— "It is contracted, agreed, and ended between the parties following, that is to say, *D. G.*, of, &c., and *T. R. S.*, of, &c., two of the accepting and surviving tutors and curators appointed to *G. F. C.* (the plaintiff); and they the said *D. G.* and *T. R. S.*, in the name and on the behalf of, and taking burthen on them for the said *G. F. C.*, proprietor of the lands, estate, and salmon fishings hereinafter mentioned, and who is yet a minor, on the one part; and *R. W.*, of, &c., (the defendant) on the other part, in manner following, that is to say." It then stated that a tack of the fishery in question had been put up to public roup—that the defendant had been the highest bidder for it—and that a new tack was to be made. "Therefore the said *D. G.* and *T. R. S.* curators for, and in the name and on the behalf of, and taking burthen on them for the said *G. F. C.*, have set," &c., demising the fishery to the defendant for four years from *Candlemas* 1821. "And they the said *D. G.* and *T. R. S.*, as curators and taking burthen as aforesaid, bind and oblige the said *G. F. C.* and his heirs, &c., to warrant the said *R. W.*, in the peaceable possession, &c.; and the said *D. G.* and *T. R. S.*, as curators aforesaid for the said *G. F. C.*, bind and oblige themselves" to execute the tack. "And the said *R. W.*, and along with him *T. C.*, as his cautioner, bind and oblige themselves" to accept the tack, "and to pay yearly to the said *G. F. C.*, or to any person or persons duly authorized by him to receive the same, the sum of 1210*l.* sterling," &c. "And, lastly, both parties

1823.

CARNEGIE *v.* WAUGH.

bind and oblige themselves" mutually to perform their part of the agreement. At the trial of the cause before *Abbott*, C. J., at the *London* adjourned Sittings after last Term, the plaintiff's case rested upon proof of the execution of the tack and of the arrear of the rent; there was no evidence that the plaintiff was still a minor when the action was brought. It was contended for the defendant, that the action could not be maintained by the present plaintiff, on two grounds; first, as it was not in evidence that the plaintiff had arrived at full age, it was to be presumed that he was still what the instrument described him, a minor, and as such he could not maintain any action; and, second, whether he was now of full age or not, still, as the agreement was made during his infancy by his guardians with the defendant, the plaintiff was no party to it, and therefore could not sue upon it: and in support of the latter objection, *Gilby* v. *Copley* (*a*) was cited. The learned Judge however, was of opinion, first, that unless the defendant could shew that the plaintiff was still a minor at the time when the action was brought, the Court must presume him to be of full age, and capable of suing; and second, that although he was not expressly a party to the agreement, still as it was made altogether in his name, and for his benefit, and as the payments were reserved of himself personally, he was not within the rule of law contended for, and was not therefore disqualified from maintaining an action upon the instrument; and therefore directed the Jury to find a verdict for the plaintiff.

Chitty now moved for a rule to shew cause, why the verdict should not be set aside, and a new trial granted, and relied upon the second objection taken at nisi prius. It is quite clear, that a man cannot sue upon a deed to which he is not a party, and it cannot be said that the plaintiff in this case, is a party to the deed upon which the action is

(*a*) 3 Lev. 136.

brought. It must indeed be admitted, that a third person may sue upon a parol contract, or upon a deed-poll, made between two others, if it be for his benefit, but he cannot sue upon a deed inter partes. Now, the tack in this case seems to have the character and nature of a deed inter partes, the distinguishing quality of which, and that which excludes a stranger from benefiting by it, is, that it is an executory contract by which several persons, distinctly pointed out by name, are *mutually* bound to the performance of certain acts. It is true, that the present instrument is not under seal, but it is not therefore the less solemn or binding. By the custom of *Scotland*, sealing is dispensed with in all deeds, but other equivalent formalities are used, and their authenticity is undiminished. *Erskine's* Scotch Law, b. 3. c. 7. s. 2. This tack therefore, being in substance a deed inter partes, and by the Scotch law, in all its legal effects a deed *under seal*, ought to have the full operation of a deed, and must be held to be within the rule of law contended for. It is the same with respect to a *Jamaica* bond, which, although by the custom of the island it is not under seal, is always declared upon in this country as a bond. It is quite clear, that the plaintiff was a minor at the time when the deed was made, and therefore could not legally be a party to it; there is no evidence that he is even yet of an age to maintain an action; and as he is no party to the deed, in fact, he cannot take the benefit of a contract made between other parties, even though made with reference to his advantage, and in his name. He cited *Gilby* v. *Copley* (*a*), *Pigott* v. *Thompson* (*b*), *Scudamore* v. *Vandenstene* (*c*), and *Salter* v. *Kidgley* (*d*).

ABBOTT, C. J.—This objection was taken at the trial. I was then of opinion, that it had not sufficient weight to justify a nonsuit, and I am equally of opinion now, that

(*a*) 3 Lev. 138.
(*b*) 3 Bos. & Pul. 147.
(*c*) 2 Inst. 673.
(*d*) Carth. 77.

1823.

CARNEGIE
v.
WAUGH.

it is no ground for setting aside the verdict and granting a new trial. The rule of law which it is attempted to apply to the present case, is undoubtedly restricted to *deeds* properly so called, to contracts under seal. It is argued that the present instrument is in substance a deed inter partes, and is by the usage of *Scotland*, as valid an instrument as if it were under seal. With regard to the latter argument, the fact may be as contended for, but that cannot influence our decision; its validity there, cannot strengthen its operation here, nor can the usage of *Scotland*, prevail against the settled law of *England*, in the case of an action brought in this country. As respects the former argument, the tack does not appear to me to be substantially a deed inter partes to the exclusion of the plaintiff, so as to render him a stranger to it. It is framed in his name, and for his benefit, the rent is reserved payable to himself personally, and he is "bound and obliged" to give peaceable possession of the estate demised. But at any rate this is not a deed under seal, and I am not aware of any case which has extended the rule, that a third person cannot take advantage of a deed inter partes, to contracts not under seal. I think the present case is fully and strictly within the exception stated in the note to the case of *Pigott* v. *Thompson*, and therefore, there is no ground for disturbing the verdict which the Jury have found.

The other members of the Court concurred.

Rule refused.

Williamson *v.* Johnson.

Monday, Jan. 27.

Declaration by indorsee against acceptor of a bill of exchange, averred that the bill had been indorsed to certain persons *trading under the firm of H. and F.*, and that *H.* and *F. had indorsed the bill by procuration of one J. D. to C.* from whom plaintiff derived title. In proof it appeared that the firm of *H.* and *F.* had ceased to exist for ten years prior to the indorsement, but that a new firm of *H.* and *Co.* had been established, and that *D.* one of the members thereof, was in the habit of indorsing bills by procuration in the name of *H.* and *F.*, but that all other transactions in trade were carried on in the name of *H.* and *Co.* only: Held, that as between innocent indorsee and acceptor there was sufficient evidence to satisfy the allegation in the declaration.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange. The declaration stated that one *James Tyrrell*, on the 1st *July*, 1821, at *Maidstone*, drew the bill of exchange in question upon the defendant, payable two months after date to the order of the drawer, for 154*l.* 12*s.*, which was accepted by the defendant; that *Tyrrell* afterwards indorsed the bill to certain persons *trading under the firm* of *Habgood* and *Fowler*; that *Habgood* and *Fowler* indorsed the bill by procuration of one *John Dickson* to one *Robert Cowie*, and that *Cowie* indorsed it to plaintiff. Plea, Non Assumpsit, and Issue thereon. At the trial before *Abbott*, C. J. at the *London* adjourned Sittings after last Term, the evidence to support the averments that the bill was indorsed to certain persons trading under the firm of *Habgood* and *Fowler*, and by them indorsed by the procuration of *John Dickson*, was, that about ten years since persons of the name of *Habgood* and *Fowler* had carried on trade in copartnership, and had kept cash at the banking-house of Messrs. *Masterman* and *Co.*; that ten years since *Fowler* died, and thereupon *Habgood* entered into a fresh partnership with persons named *Dickson* and *Garrard*, and carried on business under the firm of *Habgood* and *Co.* There was no proof that since then the new partnership had carried on any business in the name of *Habgood* and *Fowler*; but it appeared that *Dickson*, one of the firm, was in the habit of indorsing bills in the form stated in the declaration, namely, by procuration of *Habgood* and *Fowler*, for the purpose of discount. There was no proof that *Habgood* or *Garrard* knew that *Dickson* had so indorsed the bill in question; but it appeared that the names of *Habgood* and

1823.
WILLIAMSON v. JOHNSON.

Fowler were only used in bill transactions. It was objected on the part of the defendant, upon this evidence, that the plaintiff must be nonsuited, because the bill being indorsed in the name of a firm which had long ceased to exist, the averments above mentioned were not sustained. The learned Judge declined nonsuiting, but saved the point, and the plaintiff had a verdict, with liberty to the defendant to move to enter a nonsuit.

Marryat now moved accordingly, and renewed the objection, contending that the action would not lie, the bill being indorsed in the names of a non-existing partnership. The declaration averred the indorsement to have been made by procuration, whereas *Dickson*, the indorser, being a member of the trading firm of *Habgood* and *Co.* was a principal, and not a procurator. There was no evidence therefore to prove that there were any persons carrying on trade in the name of *Habgood* and *Fowler*, so as to satisfy the averment in the declaration. It was distinctly proved in evidence, that the firm of *Habgood* and *Co.* carried on their dealings merely in that name, and had never used the names of *Habgood* and *Fowler*. The only way in which those names were used was by *Dickson* alone, and that merely in bill transactions, and this apparently without the knowledge or privity of his partners. The question then was, whether there was evidence to satisfy the averment in the declaration that the bill was indorsed to persons trading under the firm of *Habgood* and *Fowler*, and by them indorsed by procuration of *Dickson*. He contended that there was not, and therefore the plaintiff must be nonsuited.

ABBOTT, C. J.—The case proved on the trial was this:—Three persons of the names of *Habgood*, *Dickson*, and *Garrard*, were in partnership together, and were generally known under the firm of *Habgood* and *Co.* All their dealings by buying and selling were in the name of *Habgood*

and *Co.*; but it appeared that *Dickson*, one of the partners, had been in the practice of indorsing bills for the purpose of having them discounted, in the names of *Habgood* and *Fowler*, using his own name as a procurator. The question then properly is, whether, sending forth bills of exchange into the world, for the purpose of discount, under that firm, is sufficient evidence that there were persons carrying on trade and commerce under that firm. It occurred to me that I ought not to nonsuit the plaintiff, inasmuch as between third persons this was sufficient evidence of a trading under the firm of *Habgood* and *Fowler*, to satisfy the averment in this declaration. The verdict in this action cannot be given in evidence hereafter in any suit that may be brought upon this, or any other similar bill of exchange against *Habgood* and *Co.*; but as between an innocent holder and the acceptor, it seems to me that there was proof sufficient to satisfy the allegation, that there were persons trading under the firm of *Habgood* and *Fowler*, to enable the plaintiff to recover, although the business was carried on by the new partnership, under the firm of *Habgood* and *Co.* I think, therefore, there is no ground for disturbing this verdict.

BAYLEY, J.—I am of the same opinion. It was not necessary in this case to have stated the indorsement of *Habgood* and *Fowler*, by the procuration of *Dickson*, because it would have been sufficient to have stated in the declaration, that the bill was indorsed by *Tyrrell*; but notwithstanding that, I think there was enough to satisfy the averment of an indorsement to persons trading under the firm of *Habgood* and *Fowler*. The question is, whether the allegation that the bill was indorsed by *Habgood* and *Fowler*, by the procuration of *Dickson*, was made out. I think there was sufficient evidence to show, not that the old firm was a continuing firm, but that the new firm, for certain purposes in their trade, were in the habit of using, as

1823.
WILLIAMSON v. JOHNSON.

one of their names of designation, the old name of *Habgood* and *Fowler*; because it is stated that *Dickson*, who was entrusted generally with the management of the business, for the purpose of discounting bills of exchange, was in the habit of using the name of *Habgood* and *Fowler*, and it is very probable that the name of *Habgood* and *Fowler*, was used at the banking-house where the firm kept cash, for the purpose of discount, and for this reason the new house were in the habit of using the name of the old firm in bill transactions, though not for other purposes. What would be the consequence if we were not to consider that this name has been used generally by the new house, in bill transactions? Why this bill, and all other bills of the house so indorsed, must be treated as forgeries; for if there was no house of the name of *Habgood* and *Fowler*, and the new firm issued bills of exchange with those names upon them, one of the consequences would be, that they would have a tendency to defraud every person who took them, and consequently, would be forgeries. That, however, I think would be a mischievous proposition to result from the conduct of *Dickson*, in this case. I am therefore of opinion, that there was evidence to make out, that there were certain persons trading under the firm of *Habgood* and *Fowler*, and also sufficient to support the other allegation, that the bill was indorsed by that firm by the procuration of *Dickson*. He was not a stranger to the house, but one of the partners in the new firm, and his act may be considered as the act of the whole partnership, and he cannot be considered as acting in his individual capacity. If the other members of the new firm knew that *Dickson* used the name of *Habgood* and *Fowler* from time to time, they are to be bound by what he does. Here the indorsement appears to have taken place for the purposes of the house, and though the act of indorsement is stated to have been done by procuration, I am of opinion that both allegations are sufficiently made out.

HOLROYD, J.—I am of opinion that the verdict is right. This action is brought by a third person to whom the bill is indorsed, and in the declaration the indorsements are set out as they appear upon the bill; and I apprehend, that proving the hand-writing of *Dickson* to the indorsement, importing that it was indorsed in the names of *Habgood* and *Fowler*, by his procuration, would be sufficient without giving evidence of the actual existence of such a house. As this is an action by the indorsee against the acceptor, I think there was sufficient to satisfy the allegation in the declaration, as to the indorsement in the manner set out.

BEST, J.—It is impossible that the defendant can be prejudiced by a verdict against him. The original house of *Habgood* and *Fowler*, can never maintain an action against him, nor can he be called upon by the new firm. Under these circumstances, as this is the case of an innocent indorsee, I think there was abundant evidence to shew that *Habgood* and *Co.* did use the name of *Habgood* and *Fowler*.

Rule refused.

BALDWIN and Others *v.* RICHARDSON and Another.

Monday, Jan. 27.

The traveller of plaintiffs, tradesmen in *London*, upon receiving a bill of exchange in payment of a debt due to his principals, from *A.* at *Derby*, pays it away to *B.* without communicating to his principals the names of the person of whom he has received it. *B.* pays it to *C.* his brother, at *Luton* in *Beds*, by whom it is paid to his banker. The bill is dishonoured on the 3d *April*. On the 5th *C.* receives notice of the dishonour, and he not knowing the parties to the bill, writes to his brother *B.* for information, who being then at *Edinburgh*, does not receive the letter until the 10th, when notice is sent to the plaintiffs, and by them received on the 13th. On the 14th plaintiffs write to *C.* for the bill, and receive it on the 16th, and by that day's post give notice to *A.*, the original indorser:—Held, that there were no laches which would discharge *A.*'s liability as indorser.

ASSUMPSIT by the indorsees against the indorsers of a bill of exchange, dated 31st *January*, 1821, payable two months after date, for the sum of 26*l.* 4*s.* Plea, Non

1823.

BALDWIN v. RICHARDSON.

Assumpsit, and Issue thereon. At the trial before *Abbott*, C. J. at the *London* adjourned Sittings after last Term, it appeared in evidence, that the bill in question was given by the defendants, booksellers of *Derby*, to one *Wilson*, traveller to the plaintiffs, who were wholesale booksellers of *London*, in payment of a debt due from the defendants to the latter. *Wilson* handed the bill to one *Waller*, a traveller for his brother, a manufacturer, living at *Luton*, in *Bedfordshire*; *Waller* sent the bill to his brother; the latter sent it to his own bankers, who presented it for payment on the 3d of *April*, 1821, when it became due. The bill being dishonoured, notice of the dishonour was received by *Waller*, of *Luton*, on the 5th of *April*, and on the 6th, not knowing any of the parties to the bill, he wrote to his brother for information upon the subject, who at that time was in *Edinburgh*. That letter was received on the 10th of *April*, and by the same day's post *Wilson* wrote to the plaintiffs, informing them of this transaction, and they received the letter on the 13th. On the 14th the plaintiffs wrote to *Waller*, of *Luton*, for the bill, and they received it on the 16th, and by the same day's post informed the defendants of its dishonour. At the trial the defendants went for a nonsuit, on the ground, that they were discharged by the laches of the plaintiffs. It was urged, that *Wilson*, the plaintiffs' traveller, ought immediately to have communicated to them the name and address of the person from whom the bill was received, and that *Waller* should also have communicated to his brother, of whom he had obtained it, and consequently that the plaintiffs were bound by the laches of *Wilson*, their traveller, and of *Waller*; but the learned Judge was of opinion that due diligence had been used in communicating the dishonour to the defendants, and therefore the plaintiffs had a verdict.

Denman, C. S., now moved for a rule to shew cause why the verdict should not be set aside and a new trial granted,

1823.

BALDWIN v. RICHARDSON.

and contended, that the defendants were discharged by reason of the negligence of the plaintiffs' traveller, in not communicating to his principals from whom he had received the bill, so that when it was dishonoured no time might be lost in giving notice. Unless the plaintiffs' traveller was bound to give notice in a case of this description, the last indorser might be subjected to the greatest hardship and injustice, because the bill might be sent round the world in order to find out the last indorsee, for the purpose of tracing it to the first. This inconvenience would have been remedied had the plaintiffs been informed by their traveller, of whom the bill was received; but having omitted to do so, the defendants were discharged by his laches. He cited *Bateman* v. *Joseph* (*a*).

Per Curiam.—The general rule as to notice in cases of this description is, that each indorsee shall give notice of dishonour to the last indorser as soon as he reasonably can. The plaintiffs in this case appear to us to have used due diligence in giving notice to the defendants after they were informed of the fact of the dishonour of the bill. The intermediate delay which had taken place necessarily arose from the manner in which the bill had been circulated. It would be a great obstruction to mercantile transactions, if we were to lay it down as a rule, that a person travelling about the country as agent, and taking a bill of exchange, and passing it away again, is bound to inform his principal of whom he has taken it. We are called upon to lay down a new rule as to notice of the dishonour of a bill of exchange. If we were to lay down such a rule, the effect of it would be to impede and prevent the circulation of bills of exchange throughout the country, to a most mischievous extent.

Rule refused (*b*).

(*a*) 12 East, 433.

(*b*) Vide *Goodall* v. *Dolley*, 1 T. R. 712.

Monday, Jan. 27.

CRAWSHAY and Others *v.* EADES.

A. consigns a quantity of iron to *B.* in barter, and *C.* the carrier, delivers a part of the cargo on the wharf of the latter, but before the remainder is delivered, *C.* discovers that *B.* is insolvent, and re-ships the part delivered, and retains the whole to satisfy his lien for the freight of the cargo, and for a general freight account between him and the consignee: Held, that the consignor's right of stoppage in transitu was not gone, and that he might maintain trover against the carrier for the goods.

TROVER for ten tons of iron. Plea, Not Guilty. At the trial before *Abbott*, C. J. at the *London* adjourned Sittings after last Term, it appeared in evidence, that in the month of *January*, 1822, the plaintiffs, iron merchants, of *London*, agreed with Messrs. *S.* and *W. Hornblower*, iron manufacturers, in *Staffordshire*, to exchange or barter with them a certain quantity of iron, for a quantity of coach spring steel, of equal value. The iron was delivered by the plaintiffs, at their wharf, in *Upper Thames Street*, on board the barge of a person in the employment of the defendant, a common carrier, by whom it was taken to *Brentford*, where it was put on board two boats belonging to the defendant, to be conveyed by the Grand Junction Canal to Messrs. *Hornblowers'* manufactory. By the terms of the agreement between the plaintiff and *Hornblowers*, the latter were to pay for the carriage of the iron to them, and also for the carriage of the steel to be returned in barter. The boats with the iron on board arrived off *Hornblowers'* iron works on the 8th of *February*, and on the next day the greater part of the cargoes was landed on the wharf; but in the progress of landing the remainder, an extent in aid was put upon the premises, and the works stopped, upon which the defendant reloaded the iron which had been landed, and took the whole away to his own warehouse, and afterwards converted it to his own use. Soon afterwards Messrs. *Hornblowers* became bankrupt, and obtained their certificate. On the 28th *February* a formal demand of the iron was made upon the defendant, with an offer to pay him his charges of carriage, &c., to which the defendant sent the following answer, dated 4th *March*:—" I consider I have a lien upon the iron delivered by Messrs. *Crawshay*

1823.

CRAWSHAY v. EADES.

into my boats for Messrs. *Hornblowers*, not only for the carriage thereof, but for a general freight account due from Messrs. *Hornblowers* to myself; therefore I shall not give it up unless I am compelled to do so, and besides I have had a notice not to give up any iron in my possession, but to such person as the commissioners under *Hornblowers'* bankruptcy may appoint."

The question at the trial was, whether there had been such a delivery of the iron to Messrs. *Hornblowers*, as to deprive the plaintiffs of the right of stoppage in transitu. The learned Judge charged the Jury, that unless there was a complete delivery of the iron, the plaintiffs' right of stoppage was not gone, and could not be defeated by the defendant's lien as a carrier; but told them that they were to decide whether the delivery had been complete. The Jury found a verdict for the plaintiff, damages 226*l.*

Marryat now moved for a rule to shew cause why the verdict should not be set aside and a new trial granted. Admitting that the question in this case must depend upon whether there had been a delivery of the iron to the *Hornblowers*, yet there has been such a delivery as between the carrier and them, as to deprive the plaintiff of his right of stoppage in transitu. Here almost all the iron was in fact delivered on the wharf, and nothing remained to be done so as to complete the delivery of that part of the cargo. The delivery of a part must, in point of law, be considered as the delivery of the whole. It is not essential to the carrier's right of lien for freight, that there shall be a complete and final delivery of the goods intrusted to his care for conveyance. Weighing the iron, in this case, was not requisite in order to complete the delivery; for by an affidavit now produced, it appears that it never was the practice to weigh the iron on delivery at the wharf, so as to give the defendant a right to his freight. Unless therefore it be laid

1823. CRAWSHAY v. EADES.

down as a general rule, that so long as there remains a single bar of iron on board, it is not a delivery in law; it is clear that the plaintiffs' right of stopping in transitu is gone, under the circumstances of this case.

ABBOTT, C. J.—I am clearly of opinion, that in this case there was no delivery of the iron so as to deprive the plaintiffs of their right to stop in transitu. What is the defendant's own interpretation of the transaction? In his own letter, which was given in evidence, he does not say that he has delivered the iron, but says, "I consider I have a lien upon the iron delivered into my boats," not only for the carriage thereof, "but for a general freight account due from Messrs. *Hornblowers* to myself." That is his own interpretation of what has taken place. He does not affect to say that he has in fact delivered the iron. I am not aware of any case which lays it down that a partial delivery, or a beginning to deliver, is sufficient to give the carrier a complete right of lien, and thereby put an end to the vendor's right of stoppage in transitu. According to the evidence in this case, I am quite satisfied that there was no actual delivery. I think the defendant has by his own letter confessed that there was no actual delivery, and therefore, upon the general principle, that a carrier has no right of lien until the delivery is complete, I am of opinion that this verdict ought not to be disturbed.

BAYLEY, J.—No man can doubt as to the honesty of this transaction; and I think there is no doubt upon the law of it. As to the honesty, the case stands thus:—The plaintiffs agreed to barter certain goods to Messrs. *Hornblowers*; it is quite clear that they will never be able to pay the plaintiffs for those goods, and the proposition insisted upon is, that the defendant, who is the carrier, shall retain these goods in his hands, leaving the plaintiffs to content themselves with such dividends as they can get from the

estate of the *Hornblowers*. So much for the honesty of the transaction; but what says the law upon the subject? Now, according to law, the property in these goods would not vest in the *Hornblowers* until they were actually delivered. In order to make out that it is their property, it must be clearly established that it had passed from the middle man, the carrier, into their possession. It is insisted, that as there had been a complete delivery of part of the cargo on the wharf, we are bound to hold that that was a delivery of the whole, so as to confer upon the defendant a right of lien. I am, however, of opinion that a partial delivery is not sufficient, and that there must be an actual delivery to and possession by the consignee, of the whole. The mere corporal touch by the consignee cannot be considered such a delivery as will defeat the right of stoppage in transitu. The defendant is to make out that there was a complete delivery, and that raises the question whether, in this case, there was such a delivery. It appears that the iron is transmitted in two different parcels by two different barges; part of the iron is taken out of the barges and placed on *Hornblowers'* wharf, but for the reasons suggested, it is put on board again and carried away, and converted by the defendant to his own use. It is clear, therefore, that there was not a complete delivery. Had *Hornblowers* a right, as against the defendant, to say that this part of the cargo was delivered? I think they had not, and for this reason:—The carrier is entitled to freight in respect of the whole cargo, and the freight is not earned until the whole cargo is delivered into the possession of the consignee. The freight is not divisible, but is to be paid in respect of the whole cargo; and therefore, unless the whole be delivered, he acquires no right of lien. The defendant's own letter imports that there had not been an actual delivery. The portion of iron placed upon the wharf can only be considered as placed there in order that the remainder might thereafter be delivered, when the freight for the whole is to

1823.
CRAWSHAY v. EADES.

be paid. The payment of freight and the delivery of the whole are to be concurrent acts, taking place at one and the same time. Until there is a tender of the freight for the whole, the whole cannot be considered as delivered; for as long as any part of the cargo remains out of the possession of the consignee, the freight is not payable. According to law the delivery of a part is not a delivery of the whole. In this case the question was, whether there had been in fact a delivery of the whole; the Jury decided that there was not, and I think they have come to the right conclusion.

HOLROYD, J.—I think the point of law is against the defendant. Landing a portion of the goods on the wharf is not such a delivery as will give the carrier a right of lien. There must be a complete delivery in order to give him such a right. As soon as he delivers his whole cargo, he may demand his freight; and if his freight be not paid, he may take the goods away, and insist upon his lien. In this case the consignee had not in fact the actual possession, which must be still considered as in the carrier, though a part of the iron was placed upon the wharf. I know of no principle of law which will authorize a carrier to insist upon his right of lien for his freight until he has actually delivered the whole cargo. Until the delivery is complete, the right of lien does not arise. There being no actual delivery of the whole cargo in this case, I am of opinion in point of law, that, as between the carrier and consignee of the goods, the plaintiffs, who are the consignors, had a right to stop them in transitu.

BEST, J.—I am of opinion that the right of stoppage in transitu was not gone from the plaintiffs. If there is a perfect delivery, the right is gone; but I think in this case there was not a complete delivery, even of any part of the cargo. The defendant had not earned his freight until there was a complete delivery. It is the legal consequence,

1823.
CRAWSHAY v. EADES.

where there is an entire freight to be paid for the whole cargo, that the whole cargo must be delivered before the freight is payable. So long therefore as any portion of the cargo remains on board, the carrier's right of lien is incomplete. Freight for any part does not become due until the whole is landed on the wharf; but as soon as the whole is landed, the carrier has a right to say, "now pay me the freight." If the consignee refuses to pay freight, then he has a right to carry the whole away. I think this case falls within the rule laid down in *Ellis* v. *Hunt* (*a*), there being no actual delivery. How can it be said that there was an actual delivery in this case, merely because the defendant placed a part of the cargo on the wharf? He had not relinquished the right of control over the property in his character of carrier, because the moment he discovers that the consignee is in pecuniary difficulties, he removes the goods again on board, clearly shewing that he had not parted with the possession. There being therefore no actual delivery to the consignee, the goods must still be considered as in transitu, and consequently the consignor had a right to stop them, the defendant's lien being incomplete.

Rule refused.

(*a*) 3 T. R. 464.

MILNE *v.* GRAHAM.

Monday, Jan. 27.

A promissory note made in *Scotland*, is within the stat. 3 & 4 *Ann.* c. 9, and may be sued upon in *England.*

ASSUMPSIT by the indorsee against the maker of a promissory note for 450*l.* At the trial before *Abbott*, C. J. at the *London* adjourned Sittings after last Term, it appearing that the note was made at *Dundee*, in *Scotland*, and that the plaintiff had declared in the usual form as upon an *English* note, it was objected for the defendant that the action could not be maintained, because the statute 3 & 4 *Ann.* c. 9, which gives the like remedy upon promissory

1823.

MILNE v. GRAHAM.

notes as upon bills of exchange, does not extend to notes made in *Scotland*. The learned Judge, however, being of opinion that the objection was not well founded, the plaintiff had a verdict; and

Chitty now moved for a rule to shew cause why the verdict should not be set aside and a nonsuit entered, and renewed the objection. As the indorsee of a promissory note the plaintiff had no remedy, unless the statute of *Anne* gave it. Now the remedy given in the statute is a right of action, "in like manner as in cases of *inland* bills of exchange," the plain inference from which seems to be, that the provisions of the act were meant to be confined to notes made in *England* exclusively. If that be so, the limitation intended to be put by the legislature cannot be overstepped, and as there is no express decision upon this point, the Court will, at least, afford an opportunity for the full consideration and final adjudication of a question of such general importance. In the work of a learned writer this point is stated to be one which had never yet been determined (*a*).

Per Curiam.—The limitation assumed in argument does not appear upon the face of the statute, nor is there any case which has decided that such a construction would be right. This is a remedial law made for the encouragement of trade, and is therefore to be construed liberally. The practice of suing upon foreign as well as inland notes, has prevailed long and to a great extent, and we ought not to unsettle that practice, unless express authorities are produced for our guidance in so doing. The words of the statute do not exclude notes made in *Scotland*, and the reason and probabilities of the case clearly include them in its beneficial operation.

Rule refused (*b*).

(*a*) Selw. N. P. 4th edit. 363.

(*b*) Vide Forbes, on Bills, 174. and *Pollard* v. *Herries*, 3 Bos. & Pul. 335.

1823.

PRICE and Others v. LEA.

Monday, Jan. 27.

The traveller of a mercantile house in *London* received an order from a country manufacturer for a cask of cream of tartar, and also an offer to purchase two chests of lac dye at a given price. The traveller undertook to send both articles, but stipulated, on the part of his principals, that they should be at liberty to refuse to fulfil the contract as to the lac dye, on the terms proposed, by writing to the vendee to that effect by return of post, or the post following. No answer was sent back; but shortly afterwards the goods were delivered. The vendee accepted the cream of tartar, but renounced the lac dye: Held, that this was not an acceptance to take the case out of the statute of Frauds, and render the vendee liable for the lac dye, the contract not being entire.

ASSUMPSIT to recover the price of two chests of lac dye, and one cask of cream of tartar, sold and delivered by the plaintiffs to the defendant. As to the cream of tartar, the defendant pleaded a tender; and to the demand for the lac dye, non assumpsit, upon which there was issue joined. At the trial before *Abbott*, C. J. at the *London* adjourned Sittings after last Term, it appeared in evidence, that the traveller of the plaintiffs, who were merchants and dry salters in *London*, called on the defendant, a carpet manufacturer, at *Kidderminster*, for orders, when a conversation ensued respecting the price of lac dye, and being told that the price was about 7*s*. or 7*s*. 3*d*. per lb., the defendant made an offer to take two chests at 6*s*. 9*d*. per lb., at six months credit, and at the same time gave an order for the purchase of one cask of cream of tartar, at 5*l*. per cwt., also at six months credit, which was to be forwarded to the defendant with the lac dye. The order was entered in the traveller's order book in the presence of the defendant. The traveller, however, at the time, stipulated, on the part of his employers, that they were to be at liberty to refuse to fulfil the contract on the terms proposed, by writing to the defendant to that effect by the return of post, or the post following; but that if they accepted the offer made, they were to forward the chests of lac dye, together with the cream of tartar, in due course. The order was given on the 21st *March*, 1821; on the day following the traveller wrote to the plaintiffs requesting them to forward the lac dye and the cream of tartar to the defendant immediately, without informing them that he had reserved to them the liberty of refusing to execute the order, by writing to

1823.

PRICE v. LEA.

the defendant to that effect by return of post, or the post following. The plaintiffs accordingly proceeded to execute the order for the lac dye and the cream of tartar on the terms mentioned by their traveller; and on the 29th *March* they forwarded the goods by a canal boat to the defendant. On the 2d *April* the plaintiffs wrote to the defendant, inclosing an invoice of the goods, informing him that they had been forwarded according to his wishes. By return of post the defendant sent back the letter and the invoice, informing the plaintiffs that he could not take the goods invoiced, inasmuch as their traveller was to make them the offer, and that he was to be informed whether or not they accepted it in course of post; and as they had failed in doing so, he had ordered the lac dye he wanted from another house. With respect to the cream of tartar, he consented to take that, and finally refused to accept the lac dye. It was contended at the trial that the plaintiffs could not recover for the lac dye, being barred by the statute of Frauds. In answer it was urged, that the statute of Frauds did not operate, because the order for the goods, including both the lac dye and the cream of tartar, being entire, the acceptance of the cream of tartar was sufficient to take the case out of that statute. The learned Judge, however, was of opinion, that as there was no absolute order for the goods, but an order depending upon something to be done by the plaintiffs, the case was within the operation of the statute, and therefore directed a nonsuit.

Copley, S. G., now moved for a rule to shew cause why the nonsuit should not be set aside and a verdict entered for the plaintiffs. He contended that the order for the goods must be considered entire and absolute, and consequently, as part of the goods was accepted, the case was within the exceptive part of the 17th section of the statute of Frauds. He admitted that the order was not absolute in the first instance, but upon a condition merely as to the



willingness of the plaintiffs to execute it. If the plaintiffs did not signify their assent within the time stipulated, it was to be taken that they did assent, and that the order was to be executed. The option given in this case not having been exercised, the order was then to be considered as absolute. The consent of the defendant to the contract was evidenced by his giving the order, and as the plaintiffs had ratified the contract by sending the goods within a reasonable time, the defendant was bound to pay for them. At all events the defendant must be considered as having ratified the contract, because when the goods were sent to him, he accepted a part, and rejected the rest. As the contract was originally entire, and as he had subsequently ratified it by acceptance of a part of the goods, he was not at liberty to renounce the rest without the plaintiffs' consent.

ABBOTT, C. J.—Where the acceptance of a part of goods, which are sold, is relied upon, to take the case out of the statute of Frauds, it must be an acceptance of a part of goods, bought under one entire contract. It struck me at the trial, and I am of the same opinion now, that this could not be considered as one entire contract for the two commodities, inasmuch as the plaintiffs were to be at liberty to refuse to deliver the lac dye. According to the evidence, a positive order is given for the cream of tartar, and then an offer is made to purchase the lac dye at so much per pound, being less than the current price of the article, as stated by the traveller. A stipulation is then made by the traveller, that his employers should be at liberty to accept or refuse *that* offer, but with a promise that their assent or refusal should be signified to the defendant within a post or two. Therefore, whether the order was to be considered as absolute or not, was to depend upon the plaintiff's answer one way or the other within a post or two. No answer was in fact sent upon the subject until the goods were sent, and I think the defendant was at liberty to reject

1823.

PRICE v. LEA.

the lac dye. I took the opinion of the Jury upon the evidence as to the question whether there had been a stipulation that the plaintiffs should be at liberty to refuse to deliver the lac dye, in order that the parties might not come down to a second trial, and the Jury having found that fact in the affirmative, I nonsuited the plaintiffs, being of opinion that this was not an entire contract, and that the acceptance of the tartar could not be considered as a ratification, so as to make the defendant liable for the lac dye. I however gave the plaintiffs leave to move to enter a verdict if the Court should think I had given an erroneous opinion.

HOLROYD, J. (a)—It appears to me, that in this case there were two contracts, one for the cream of tartar, which was entire and absolute, and the other for the lac dye, which was conditional and uncertain, depending upon the answer of the plaintiffs within a given time. As no answer was sent within the period stipulated, the contract as to the lac dye was at an end. I am of opinion, therefore, that the plaintiffs were not entitled to recover.

BEST, J.—The lac dye was the subject of a distinct contract, which was to become absolute or not, according to the assent or refusal of the plaintiffs, to be signified within a time stipulated. No answer one way or the other was in fact sent; and therefore the defendant was at liberty to repudiate the lac dye under the circumstances stated. The acceptance, within the meaning of the statute of Frauds, must be an acceptance of a part of the subject-matter of an entire contract. The acceptance here was of a distinct article, positively ordered; but that cannot be considered as the acceptance of another article, the order respecting which was only conditional.

Rule refused.

(a) *Bayley*, J. was absent.

The KING *v.* The JUSTICES of WARWICKSHIRE and The GUARDIANS of the POOR of BIRMINGHAM.

Monday, Jan. 27.

By statute 23 *Geo.* 3. regulating the affairs of the poor of *Birmingham*, the guardians and overseers thereby appointed are directed to adjust their accounts at quarterly meetings of their own body; and an appeal is given to the Sessions in respect of all matters done by virtue thereof; but the statute is silent as to any submission of the overseers and guardians accounts to magistrates, as required by 50 *Geo.* 3. c. 49. Held, however, that mandamus would lie from this Court to the guardians and overseers to pass their accounts in the manner required by that statute.

IN *Trinity* Term a rule nisi was granted, calling upon the Justices of *Warwickshire*, to shew cause why a writ of certiorari should not issue, to remove into this Court a certain order made at the last *Easter* Sessions, dismissing the appeal of *William Phipson*, against the payment of the sum of 396*l.* 13*s.* 4*d.* by the guardians and overseers of *Birmingham*, to the constables of the said parish, for the purpose of quashing the same; and also calling upon the said guardians and overseers to shew cause, why a writ of mandamus should not issue, commanding them to pass their accounts for the years 1821 and 1822, pursuant to the statute 50 *Geo.* 3. c. 49. On shewing cause against this rule, the case was this:—By the act of 23 *Geo.* 3. c. 44. for regulating the affairs of the poor in *Birmingham*, the guardians and overseers thereby appointed are directed to adjust their accounts at quarterly meetings of their own body. The statute gives an appeal to the sessions in respect of all matters done by virtue of that act, but is silent as to any submission of the overseers and guardians accounts to magistrates. At a meeting of the rated inhabitants, for the purpose of passing the accounts of the constables for the years 1821 and 1822, the accounts were disallowed, on the ground that amongst them was included a sum of 296*l.* 13*s.* 4*d.* being the amount of a bill of costs and charges, for prosecuting a person named *George Edmonds*, for publishing a libel of and concerning the conduct of two county Justices, in committing to prison a person named *William Plastans*, on the ground that he was a pauper who had been passed to his parish, and had returned without a certificate; but at a subsequent meeting, the same bill was

1823.

The King v. The Justices of Warwickshire.

again presented, together with one for additional costs respecting the same prosecution, amounting to 100*l.*, both of which were allowed by a small majority of the persons present, upon which allowance the total amount was paid by the guardians and overseers, and formed part of their accounts. Thereupon *William Phipson*, one of the rated inhabitants, appealed at the last *Easter* Sessions against the allowance, and the appeal, after being heard, was dismissed. The appellant then applied for a case for the opinion of this Court, which was refused, except on the terms of paying the costs to which the respondents had been put by the appeal. It was now objected to the two-fold application for a certiorari and a mandamus, first, that the local act 23 *Geo.* 3. c. 44. relating to the poor of the parish of *Birmingham*, had in express terms taken away the writ of certiorari; and second, that as the guardians and overseers had already passed their accounts before two Justices (of which fact the appellant was ignorant until after the appeal had been tried), the mandamus would not lie, and that under such circumstances the Court had no authority to issue that writ.

The Court, after hearing *Scarlett*, *Adams*, and *Hill*, for the Crown, and *Reader* and *Holbech*, for the defendants, declined for the present giving any opinion as to the question whether the certiorari was or was not taken away, but as to that part of the rule which prayed for a mandamus to the guardians and overseers to pass their accounts,

Abbott, C. J. said—The question now is, whether the Court has authority to grant a mandamus to the guardians and overseers to pass their accounts. It is said that they have already passed their accounts, and that it is therefore unnecessary for this Court to interpose. If the fact be so then they may return that fact to the writ of mandamus. The granting the writ therefore, will only put the question

into a more solemn course of inquiry. I am quite satisfied that the local statute does not take away the jurisdiction of this Court in granting a mandamus. The local statute certainly gives the right of appeal to the Sessions, and whatever may be the construction to be put upon that statute as to the writ of certiorari, it clearly does not take away from us the power of ordering the guardians and overseers to do what is fit and proper to be done, prior to the exercise of the right of appeal. The question upon the present view of the case is, whether the accounts have been passed; I mean passed, so as to direct the attention of those who are to pass them, to this particular item, which is the subject of objection. I do not say that in the investigation of voluminous accounts, such as these, the attention of the Justices is to be directed to the expenditure of every shilling which may happen to have been paid by the guardians in the ordinary discharge of the duties of their office, such as trifling sums paid to paupers, or minute expences of that description. The strong fact here alleged is, that a very large sum of money had been paid for a particular purpose, the legality of which payment might be doubted. It is now supposed to have been paid under the sanction of the authority of the magistrates, before whom it was the duty of the guardians and overseers to pass their accounts, but against the opinion of many persons who thought that such a disbursement ought not to have been made. It is alleged that the overseers and guardians were apprized of such objections before they proceeded to pass their accounts. Under such circumstances, it was their duty in seeking to have the allowance of such an item, to have directed the attention of the magistrates to that item, so that the magistrates might exercise their judgment upon the subject, and allow, or disallow it, according as they were satisfied or dissatisfied with it. What is the allegation in this case? The party who makes the affidavit states, that he was present when the accounts were submitted to

1823.

The King v. The Justices of Warwickshire.

the Justices, but that the attention of the Justices was not called to, nor did they proceed to examine the whole of the items, but merely looked at the summary, in which was a lumping sum of 2000*l.* paid to the constables for their expences. There is no affidavit on the other hand to shew that the Justices ever inquired into, or had their attention directed to the component parts of that sum. I am therefore clearly of opinion, that we ought to make absolute that part of the rule which prays for a mandamus to the overseers and guardians to pass their accounts, and it will be competent for them to make a return thereto. As to the remainder of the rule that may be discharged or enlarged, at the discretion of the counsel for the Crown, until we see what becomes of the mandamus.

Bayley, Holroyd and Best, J.'s. concurred.

Rule absolute for a mandamus, and the remainder of the rule enlarged.

Monday, Jan. 27.

Wilkinson *v.* Diggles.

An admitted attorney of this Court may recover for his fees and disbursements in suing out a commission of bankrupt, though he be not a solicitor in *Chancery.*

THIS was an action of assumpsit for an attorney's bill. At the trial before *Abbott,* C. J. at the *Middlesex* Sittings after last Term, it appeared that the principal subjects of demand, were the plaintiff's fees and disbursements in suing out a commission of bankrupt, at the instance of the defendant, against a creditor of the latter. The plaintiff had ceased to practise as an attorney from the year 1814 to 1820, when he was re-admitted, and took out his certificate under the statute 37 *Geo.* 3. c. 90. s. 31., and the present cause of action had arisen since his re-admission; but at the time the commission in question was sued out, he was not a

solicitor of the Court of *Chancery*. The question at the trial was, whether the plaintiff, not being a solicitor in *Chancery*, could recover his fees and disbursements for suing out a commission of bankrupt, under the 30th section of the above mentioned statute. On the part of the defendant, it was contended, that a commission of bankrupt must be sued out by a *solicitor* only, and consequently that the plaintiff could not maintain this action by virtue of that section of the statute; and the case of *Collins* v. *Nicholson* (*a*) was cited, as an authority, to shew that business of this nature would be considered as business done in the Court of *Chancery*. The learned Judge, however, was of opinion, that the action was maintainable, and the plaintiff had a verdict, with liberty to the defendant to move to enter a nonsuit.

1823.
WILKINSON v. DIGGLES.

C. F. Williams now moved accordingly, and contended, that an attorney could not sue out a commission of bankrupt unless he was also a solicitor in *Chancery*. He relied upon the words of the statute 37 *Geo.* 3. c. 90. s. 30. which subjects any person practising as an attorney, solicitor, &c. without obtaining his certificate, to a penalty of 50*l.*, and disqualifies him "from maintaining or prosecuting any action, or suit, in any Court of law, or equity, for the recovering any fee, reward, or disbursement on account of prosecuting, carrying on, or defending any action, suit, or proceeding, or having prosecuted, carried on, or defended any action, suit, or proceeding, or any matter or thing relating thereto, without such certificate." The question then was, whether suing out a commission was business done in *Chancery*; for if it was, it was clear that an attorney, not being admitted in that Court, could not sue for the fees and disbursements in question. He cited the case of *Collins* v. *Nicholson* (*b*), where the business was done by the plaintiff for a bankrupt, in applying to his creditors and to the

(*a*) 2 Taunt. 321.

(*b*) 2 Taunt. 231.

1823.

WILKINSON v. DIGGLES.

Lord Chancellor, in order to get his certificate signed: and *Mansfield*, C. J. in delivering the judgment of the Court, said, "it is now decided that all proceedings by petition to the Chancellor, are proceedings in *Chancery*, and causes of the utmost magnitude and importance come on in that shape. An application must be made to the Chancellor, to have his signature to the certificate, and it has long been settled, that where a bill contains one item which is a proceeding in a Court, all the residue of the bill, though it be even a bill merely for conveyancing, is taxable." If then suing out a commission of bankrupt was a proceeding in *Chancery*, it followed of course, that the plaintiff could not sue for his fees and disbursements in the performance of such business, unless he was a solicitor.

ABBOTT, C. J.—I do not feel myself justified in saying that an attorney of this Court cannot sue out a commission of bankrupt unless he is also a solicitor of the Court of *Chancery*. I do not say that there may not be exceptions; all I say is, that unless my mind is satisfied to the contrary in this particular instance, I must hold this action maintainable. The expressions used by Sir *James Mansfield*, in the case in the *Common Pleas*, are certainly very strong, but the effect of that decision is no more than that the business done by the plaintiff was taxable, though done by an attorney, and it does not necessarily follow that the party should be a solicitor duly enrolled in the Court of *Chancery* to enable him to do such business. That case by no means concludes the present question. I believe the practice has been for attornies of this Court to apply to a solicitor to sue out a commission of bankrupt, if it be necessary that the name of the solicitor should appear. If the name of the attorney or solicitor is not to appear upon the proceedings, I apprehend the party need not be a solicitor. If a bill in equity is filed, the name of the solicitor appears, but in suing out a commission of bankrupt, I believe, it does not.

An attorney of one Court may practise in the name of another (where that name is required) in the other Courts. If the name of the solicitor was required in this instance, the commission might be sued out by the plaintiff in the name of a solicitor, without violating the act of Parliament; but still there would be nothing to prevent his suing in his own name for the amount of his bill. If no name was requisite, then it is clear that as an attorney he might do this business. In either way of considering this case, I think it would be too much to say that the plaintiff cannot maintain this action.

BAYLEY, J. concurred.

HOLROYD, J. observed, that proceedings in bankruptcy were on the common law side of the Court of *Chancery*, and therefore, until the contrary was shewn, there was nothing to prevent an attorney suing out a commission of bankrupt without being a solicitor, and suing for his fees and disbursements in respect thereof.

BEST, J. concurred.

Rule refused (*a*).

(*a*) Vide 2 *Geo.* 2. c. 23. s. 10.

BRADY *v.* JONES.

Tuesday, Jan. 28.

Defendant tendered seven sovereigns in payment of a demand of 6*l.* 17*s.* 6*d.* and said to plaintiff "there, take your demand;" and at the same time delivered a counter claim upon plaintiff of 1*l.* 5*s.* and plaintiff said, "you must go to my attorney":— Held, that this was not sufficient to support a plea of tender to an action brought for the 6*l.* 17*s.* 6*d.*

ASSUMPSIT for the use and occupation of furnished lodgings. At the trial, before *Abbott*, C. J., at the *London* adjourned Sittings after last Term, the defendant relied upon

1823.



BRADY v. JONES.

a plea of tender, the evidence in support of which was, that he called upon the plaintiff at his residence, and laid seven sovereigns, together with a paper, containing a counter demand upon the plaintiff to the amount of 1*l*. 5*s*., upon the table, saying, "There, take your demand." The plaintiff's demand amounted to 6*l*. 17*s*. 6*d*. The plaintiff did not take up either the money or the paper, but simply replied, "You must go to my attorney;" upon which the defendant retired with the money. The learned Judge was of opinion, that this was not a good legal tender, and the plaintiff had a verdict.

C. Philips now moved for a rule to shew cause why the verdict should not be set aside, and contended, that, under all the circumstances of the case, this was a sufficient tender. The sum tendered was, in a very trifling degree, larger than the debt, but no objection was made by the plaintiff on that head; and it has been held, that where a debtor tenders more than is due, and asks change, that is a good tender if the creditor does not object to it on that account (*a*). It must be further admitted also, that the defendant presented with the money a bill for a counter demand upon the plaintiff, but he did not make any demand in terms, or at all refer to the contents of the bill; and that circumstance therefore had no bearing upon the transaction, and could not influence the plaintiff's mind as regarded his rejection of the money. It is clear that in substance and fact the sum due was tendered, and though presented in a shape somewhat exceeding the debt, still as no objection was made by the plaintiff, and no qualification or deduction claimed by the defendant, this was a good tender.

Per Curiam.—In order to support a plea of tender, there must be evidence of an offer of the specific sum due, un-

(*a*) Peake's N. P. C. 88.

qualified by any circumstance whatever. Here a larger sum than that due is offered, and is accompanied by a counter demand in writing by the defendant upon the plaintiff. In both these respects this is an insufficient tender, and therefore the plaintiff is entitled to retain his verdict.

Rule refused (a).

(a) Vide *Douglas* v. *Patrick*, 3 T. R. 683. 4 Esp. N. P. C. 68. and *Rivers* v. *Griffiths*, ante, vol. i. p. 215.

IVESON, Gent. one, &c. *v.* CONINGTON.

Tuesday, Jan. 28.

The respective attornies in a horse cause, which had been withdrawn at the assizes, signed the following undertaking: "We, the undersigned, attornies for the above named plaintiff, and the above named defendant, do hereby *personally* consent, undertake, and agree, that the record in this cause shall be withdrawn; that the above named defendant shall take back again the horse in the pleadings in this cause named, and shall pay the sum of 64*l.* 17*s.* to the above named plaintiff; *that the costs of the suit on the part of the defendant shall be taxed between the parties, on the principle between plaintiff and defendant*; and that such taxation shall be made and perfected by, &c."—Held, that the plaintiff's attorney, in the original action, was personally liable upon this undertaking to pay to the defendant's attorney the costs, when taxed, pursuant to the agreement.

ASSUMPSIT upon an agreement to pay costs. Plea, the general issue. At the trial before *Abbott*, C. J., at the *London* adjourned sittings after last Term, it appeared in evidence, that the plaintiff and the defendant were respectively the attornies, for two persons named *Loft* and *Stabler*, in an action on the warranty of a horse, brought by *Loft* against *Stabler*. That cause was set down for trial at the last *Lent* Assizes for the county of *Lincoln*, but it being agreed to withdraw the record, the present plaintiff and the present defendant signed the following agreement, upon which the present action was brought:–

Loft v. *Stabler*.

" We, the undersigned, attornies for the above-named plaintiff, and the above-named defendant, do hereby personally consent, undertake, and agree, that the record in this cause shall be withdrawn; that the above-named de-

1823.

IVESON v. CONINGTON.

fendant shall take back again the horse in the pleadings in this cause named, and shall pay the sum of 64*l.* 17*s.* to the above-named plaintiff; *that the costs of the suit, on the part of the defendant, shall be taxed between the parties, on the principle between plaintiff and defendant;* and that such taxation shall be made and perfected by Messrs. *Sandys* and *Co.* and Messrs. *Eyre* and *Coverdale*, the respective agents of the said parties, and that all expences of the keeping and maintenance of the said horse from the day when the said horse was left at *Beverley*, on his being returned, up to the day of the horse's arrival at *Lincoln*, shall be borne and defrayed by the said *James Stabler*. Witness, &c."

This agreement being proved at the trial, it was objected, on the part of the defendant, that it did not amount to a contract by him personally to pay any body; and, second, that at all events it did not amount to a contract to pay the plaintiff, and consequently the action could not be supported. The learned Judge, however, over-ruled both objections, and the plaintiff had a verdict for the amount of the taxed costs of the former action, with liberty to the defendant to move to enter a nonsuit,

Denman, C. S., now moved accordingly, and renewed both objections. As to the first, the agreement did not contain a single word about the payment of the costs, but was merely an agreement between the attornies that they should be taxed on a certain principle, and it would be going much farther than either *Appleton* v. *Binks* (*a*), or *Burrell* v. *Jones* (*b*), if the Court should be of opinion that the undertaking given was sufficient to support the action. In *Appleton* v. *Binks*, the defendant actually covenanted for another, *to pay*, and so in *Burrell* v. *Jones*, there was a clear undertaking *to pay*, but here there

(*a*) 5 East, 148. (*b*) 3 Barn. & Ald. 47.

1823.



IVERSON v. CONINGTON.

was no such undertaking. This agreement could not be considered as a personal undertaking binding upon the defendant himself, for the utmost it amounted to, was to render him a surety for his client, and therefore he could not be liable to pay the costs, until the client refused to pay. When an attorney undertakes for his client to do a particular act, he is never supposed to undertake personally, and thereby render himself liable in case of a default on the part of his client. The agreement in question indeed did not amount to an undertaking binding upon either party. An attorney is supposed by virtue of his retainer to have a general authority to act for his client, and whatever is done under that authority is binding only upon the client. Here the defendant had only contracted on behalf of his client, and where the party contracting is known to be a mere agent, he is not personally responsible (*a*). Then, with respect to the second objection, supposing this were held to be a contract *to pay*, surely it could not be a contract to pay the present plaintiff, but *Stabler*, the defendant in the original action, who would be entitled to receive the costs; and therefore he was the proper party to have brought the action. The agreement amounted to a mere personal undertaking by the respective attornies that certain things therein contained should be done, and the Court would not travel out of it for the purpose of supporting the present action.

Per Curiam.—This clearly amounts to a personal agreement binding upon the parties who have signed it. There is nothing in the agreement which can in any way bind the client; he does not undertake to pay. What is the use of the word "personally" unless it binds the individual signing the paper? If the defendant only meant to bind his client, it can hardly be supposed that he would not have so expressed himself. Here the principal is out of the question;

(*a*) Vide *Macbeath* v. *Haldimand*, 1 T. R. 172. and *Bowen* v. *Morris*, 2 Taunt. 374.

1823.

Iveson v. Conington.

and it is highly probable that the parties would not have trusted the client, and therefore stipulated for the personal undertaking of the attorney. Suppose the client were sued upon this undertaking, he would have a right to say, "I never authorized my attorney to do this; it is true I have given him a general authority to do the best for me; but I do not think this is the best thing he could have done for me." We think, that when an attorney says, "I personally undertake" to do so and so, he is pledging his personal responsibility; and this case is not distinguishable in principle from *Burrell* v. *Jones*.

Rule refused.

Tuesday, Jan. 28.

POLAND and Another, Assignees of Bankrupt, *v.* GLYN and Others.

If a person in trade pays a sum of money to one of his creditors, and his affairs are in such a state that he may reasonably believe bankruptcy probable, but not inevitable, at the time he makes such payment, it is fraudulent within the meaning of the bankrupt laws, and if bankruptcy afterwards ensues, the assignees may maintain assumpsit for money had and received to their use against the person to whom such voluntary payment has been made, though the cause of action arises before the actual bankruptcy. Therefore where *A.* paid *B.* and others his bankers, on the 14th *December*, a sum of money which he owed them, as the balance of his account, and on the 15th was arrested, and went to prison and committed an act of bankruptcy by lying there for two months:—Held, that his assignees might recover back the money so paid, though at the time of the payment he did not apprehend bankruptcy.

ASSUMPSIT for money had and received. At the trial before *Abbott*, C. J., at the *London* adjourned Sittings after last Term, it appeared that the act of bankruptcy upon which the commission was founded, was a lying in prison for two months, from the 24th *December*, 1821, on which day the bankrupt was arrested, on account of certain bills of exchange, which came due on the 15th of the same month. On the 14th of the same month, the bankrupt paid to the defendants, who were his bankers, a balance which he owed them, and which constituted the sum sought to be recovered in this action. The bankrupt deposed, that shortly before the payment in question he had received a letter from the defendants, requesting to know whether he intended to

1823.

POLAND v. GLYN.

pay off his balance at the ensuing *Christmas*, as it was important to them, at that period of the year, to be informed what funds they might expect to be in-coming; but he expressly swore that he did not make the payment in consequence of that letter, but because he thought his account with his bankers was distinct from all other accounts, and that he was bound in honour to pay *them*; and that he was not, at the time of the payment, aware that bankruptcy was inevitable. The learned Judge left it to the Jury to say whether the payment to the defendants had been made voluntarily, with a view to give them a preference, or in consequence of a threat held out by them. He told them, that in point of law, if the bankrupt had at the time reasonable grounds for knowing that his payments must cease, and had intended to give the defendants a voluntary preference, then the payment was void, and the plaintiffs were entitled to a verdict; but if the money was paid under the influence of a threatening demand by the defendants, then the payment was good, and they would find a verdict for the defendants; but he added, that in his opinion the bankrupt had reasonable ground to expect a bankruptcy, and that he had paid the money with a view to give the defendants a preference, and not under the influence of a threat, to which he thought the defendants' letter did not amount. The Jury found a verdict for the plaintiffs.

Denman, C. S., now moved for a rule to shew cause why the verdict should not be set aside and a new trial granted, on two grounds, first, that the learned Judge had misdirected the Jury in point of law, by telling them, that unless the payment had been made under the terror of a threat, it could not be justified against the claim of the assignees; and, second, that under the circumstances of the case the present form of action was bad. As to the first point, a threat is not necessary to legalize a payment under circumstances such as the present; a demand of a debt, in

1823.

POLAND v. GLYN.

the ordinary course of business, is sufficient. *Crosby* v. *Crouch* (a). Now, there was such a demand here. What can a banker mean by asking his debtor, whether he intends to pay off his balance at *Christmas*; and what can the debtor understand by the question? It is clearly a demand for payment, and as such only can either party consider it. [*Abbott*, C. J. But the bankrupt expressly stated at the trial, that he did not pay the debt in consequence of the defendants' letter. *Bayley*, J. The rule as to this class of cases is well laid down by *Gibbs*, C. J., in *Fidgeon* v. *Sharpe* (b), and seems in substance to be this; if a man's general circumstances be such as should fairly lead him to believe bankruptcy probable, and he voluntarily makes a payment to one creditor to the exclusion of the rest, that is a fraud within the meaning of the statute 1 *Jac.* 1. c. 15. s. 2; but otherwise if he makes it in consequence of the pressing importunity of the creditor; for then the payment is valid.] In that view of the law it is difficult to say that it applies to the present case. The word "fraud" necessarily supposes concert and combination between both the parties, to injure the other creditors. Now here there was no such combination. The payment was made in the fair and ordinary course of commercial transactions, and without any intention in either party to do any thing fraudulent or unusual. [*Bayley*, J. A fraudulent intention in the common sense of the word is not necessary in order to invalidate the payment, nor is the privity of the creditor necessary. That was decided in *Harman* v. *Fishar* (c).] That case is very distinguishable from the present. That was an action of trover for two promissory notes; and there the money never reached its destination. But it has been decided, that an assignment of a bankrupt's effects, even in preference of a particular creditor, is good, if possession be delivered, *Small* v. *Oudley* (d), which case has certainly never been expressly

(a) 11 East, 256.
(b) 5 Taunt. 539.
(c) Cowp. 117.
(d) P. Wms. 427.

over-ruled, and which is cited in the subsequent case of *Alderson* v. *Temple* (a). In the case of *Smith* v. *Payne* (b), Lord *Kenyon* says, "It is admitted, that if the defendant had threatened the bankrupt in case of his refusal, the transaction would have been valid; *but there is no occasion for a creditor, under such circumstances, to threaten an actual arrest*; *and here the defendant did press the bankrupt for a security*. And, under these circumstances, *the bankrupt himself having sworn to the honesty of the transaction, and that he did not meditate a bankruptcy at the time*, and the Jury by their verdict having negatived the idea of collusion, there is no ground for setting aside their verdict." Now in every particular, except the finding of the Jury, this case is precisely similar to the present, and even that dissimilarity affords a strong argument in favour of the present defendant, because it proves that Lord *Kenyon* was of opinion that collusion between the bankrupt and the creditor was one necessary ingredient to constitute a payment by the one to the other a fraud upon the other creditors and the bankrupt laws. Upon the authority therefore of that decision, and upon a fair consideration of the circumstances of this case, it is clear that the learned Judge misdirected the Jury in point of law, and that the defendant consequently is entitled to a new trial upon that point. But the form of action adopted by the plaintiffs is clearly inapplicable to the case. This was a payment made in the ordinary course of trade by a merchant to his bankers, and was made long previous to any act of bankruptcy. How then could it be said to be the property of the assignees, who were not chosen till long after the time when it was made, and whose title accrued by relation to an act of bankruptcy not then committed, nor even then in contemplation? It could not be money received to their use, nor could it be so declared for, because there was no evidence that it was still in the defendants' hands when

(a) 4 Burr. 2235. (b) 6 T. R. 152.



POLAND v. GLYN.

the action was brought. Upon this ground, therefore, the present action is not maintainable.

ABBOTT, C. J.—I have a perfect recollection of the mode in which I left this case to the Jury; and I am free to confess that my opinion now is the same as that which I expressed to them. I told them that the object of the statute was that the whole of the bankrupt's property should be equally divided among all his creditors; that if at the time of a payment to one creditor the debtor had fair grounds for anticipating bankruptcy as a probable result, and made that payment voluntarily, such payment was a fraud upon the statute, and could not be supported; but that if it was made in consequence of the threat or importunity of the creditor, it was a legal payment and was protected. I then left it to them to say how the facts of the case stood in relation to the law, and they found a verdict for the plaintiffs.

BAYLEY, J.—I am of opinion that this case was properly left to the Jury, and that they have found the right verdict. I take the general rule of law upon this subject to be, that a voluntary payment to one creditor, under circumstances which must reasonably lead the debtor to believe bankruptcy *probable* (not *inevitable*; for I do not think it necessary the rule should go that length) is a fraud upon the other creditors, within the meaning of the bankrupt laws, and that money so paid may be recovered by the assignees when a bankruptcy has taken place. Here the defendants certainly did make an application upon the subject of their debt, but the bankrupt did not act upon that application; he went voluntarily and paid the money upon motives honourable certainly to him as an individual, but which cannot be recognized as a defence in law. It appears from the bankrupt's own evidence, that he did not act in consequence of the defendants' letter, and I think the other

facts of the case abundantly prove, that at the moment when he acted, his circumstances were such as might reasonably lead him to expect that bankruptcy was probable. I am also of opinion, that the action is maintainable in its present form. In point of law the money was wrongfully received. By the subsequent act of bankruptcy it became the property of the assignees, as the representatives of the creditors at large, and though there was no evidence that the identical sum remained in the defendants' hands, still the law will intend that it did, and that it was received to the use of the plaintiffs in their character of assignees.

HOLROYD, J.—I am of the same opinion. I think the Jury have found the facts of the case to be such as render this payment illegal within the spirit and the mischief of the bankrupt laws. With regard to the form of action, it seems to me that no other could have been adopted. It certainly was not money received to the use of the bankrupt, nor could he, under any circumstances, have recovered it back in any action brought by himself. I think the verdict ought not to be disturbed.

BEST, J. concurred.

Rule refused.

1823.

Wednesday, Jan. 29.

HOLLIS v. GOLDFINCH and Others.

The stat. 16 & 17 *Car.* 2. c. 12. for making certain rivers navigable, gave the undertakers therein mentioned power to make new cuts, &c. for the purpose of improving the navigation of such rivers, but required them to make compensation to the owners of lands, through which such cuts, &c. were to be carried, for any injury done to their property according to the determination of commissioners, or in pursuance of agreement between the parties, but the act contained no clause giving the undertakers any power to *purchase lands*, nor did it recognize in them any right of soil in the beds or banks of the rivers intended to be made navigable. Where the river *I.*, mentioned in this act, was made navigable by certain undertakers in 1702, and their successors exercised for a long series of years various acts of ownership and enjoyment of the banks by cutting bushes, &c. and had granted a lease of hatches and sluices made in one of the banks to an occupier of land adjoining thereto, for the purpose of irrigation, and there was no proof of any agreement between the undertakers and the original proprietors of the land for the purchase of the soil of the bank:—Held, that such an agreement could not be presumed from these acts of ownership and enjoyment when opposed to similar acts exercised by the occupier of the adjoining land, and that the act of parliament afforded strong evidence against such presumption:—Held also, that evidence of acts of ownership and enjoyment exercised by the undertakers on other parts of the line of the navigation was inadmissible to shew their title to the locus in quo, unless unity of title and character between the locus in quo and the other parts of the line of navigation was previously established.

TRESPASS for entering a certain close of the plaintiff, in the parish of *Compton*, in the county of *Southampton*, bounded on the east by a ditch, and on the west by part of the river *Itchen*, and cutting down the trees, underwood, and bushes, there growing. Second count described the locus in quo by the name of the bank, and bounded as in the first count. Plea, Not Guilty, and Issue thereon. This was the second trial of the same cause of action, and on both occasions the plaintiff had a verdict. At the trial before *Park*, J., at the last *Lent* Assizes for the county of *Hants*, the plaintiff claimed to be the proprietor of the navigation of the river *Itchen*. The defendant *Goldfinch* was owner of lands and meadows contiguous to the navigation, and the other defendants were labourers in his employment. The question intended to be raised between the parties was as to the right of soil in the eastern bank of the navigation, at a place called *Compton Malm* or *Mawm*. The trespass was admitted. The plaintiff rested his case upon four heads of evidence, first, certain acts of parliament passed for rendering navigable the river *Itchen*, from *Alresford* to *Winchester*; second, a lease from former pro-

prietors of the navigation to the defendants' ancestors of certain locks or sluices made in the bank of the river, for the purpose of irrigating the defendants' lands; third, acts of ownership exercised by the plaintiff in the soil of the bank in question from time to time; and, fourth, acts of ownership exercised by the plaintiff in other parts of the line of the navigation in the occupation of other persons. By statute 16 & 17 *Car.* 2. c. 12, an act for making certain rivers navigable, it was enacted, "that it should be lawful for Sir *Humphrey Bennett*, Knt. and other undertakers, their heirs and assigns, for making navigable the river *Itchen, from Alresford* through *Winchester*, to cut, dig, and make new channels from, by, or into the said river, or to scour, cleanse, deepen, or widen the same, and to do all or any other such act or acts, thing or things, as might be fit for navigating or passing the said river." It further provided, "that the undertakers should have power of making line-ways on each side the river for men and horses, not exceeding three feet on each side, and of removing all trees, and other impediments." It then provided, "That the making of all or any of the said premises, may not be anyways prejudicial to the inheritance, possession, or benefit of any person or persons, body politic or corporate whatsoever, that have any lands, tenements, or hereditaments, or wears, mills, or other profits whatsoever made use of for the effecting and repairing the aforesaid premises, be it enacted, that it shall not be lawful for the persons so authorised to dig, cut, carry, or make any trenches, river, or new rivers, &c. or new channels, &c. in or upon the lands of any person or persons, body politic or corporate, until a full agreement with, and satisfaction to the respective lords, owners, or occupiers of the said lands, be had or made by the commissioners appointed, or any five of them, as hereafter is directed and appointed, or by the said persons so authorised, nor until such recompence or satisfaction shall be given or paid to the respective owners of such lands, according to the

1823.
HOLLIS v. GOLDFINCH.

determination of such commissioners, or agreement made by the persons so authorised, unless it be by the consent of the respective owners, according to the true intent and meaning of this present act." It then provided, that in case the lords, owners, or occupiers should refuse to appear before or submit to the determinations of the commissioners, the undertakers should proceed in the improvement of the navigation by and with the order and approbation of the commissioners, and to make, maintain, and use the said locks, wears, &c. made, erected in or upon lands of him, her, or them so refusing, in as full and beneficial a manner as if agreement had been made with such owners by the persons so authorised for making the rivers as aforesaid, or as if such owners had submitted to the orders and determination of the commissioners." Then followed a clause appointing the Justices of the Peace for the time being as commissioners, for carrying the act into effect. The statutes of the 7 *Geo.* 3. 35 *Geo.* 3. and 42 *Geo.* 3, relating to the navigation of the river *Itchen*, were given in evidence, but they did not bear immediately upon the question at issue. None of the acts of Parliament, with the exception of the last-mentioned, gave the undertakers any power to purchase lands, &c. nor did any of them recognize any right of soil in the undertakers to the soil in the bed or banks of the river. The next piece of evidence was a lease, made in 1750, from the proprietors of the navigation, to the ancestors of the defendant, of water from the river, and of four hatches or sluices in the bank, through which the water was conveyed, for the purpose of irrigating the lands. Evidence was then given of various acts of ownership exercised by the undertakers of the navigation, from time to time, by cutting bushes, &c. upon the bank in question; but all these acts appeared to be referable to purposes connected with the navigation, and not for any purpose foreign thereto. Under the fourth head of evidence, witnesses were called to prove various acts of ownership and rights exercised by the undertakers on other parts

1823.
Hollis
v.
Goldfinch.

of the line of the navigation beyond the locus in quo. There was no evidence to prove that there ever had been any agreement made between the undertakers and the proprietors of the soil in question. The plaintiff mainly rested his case upon the presumption that such an agreement must have been originally entered into; and it was urged, that the lease above-mentioned, and the various acts of ownership exercised by the undertakers, were abundant evidence to confirm that presumption, and to establish the plaintiff's right of soil in the locus in quo. On the other hand, it was not denied that the plaintiff had a right to use the spot in question, or any part of the bank of the river, for such purposes as the navigation required; and it was even admitted, that he had a right to cut bushes, or take soil there, for the purpose of repairs, or other navigation uses; but it was contended, that he had no right of soil whatever in the bank, but had merely the use of it by licence as connected with the navigation of the river. The evidence for the plaintiff was met by proof of various acts of ownership exercised by the defendant in the locus in quo for a period of forty years, without interruption, such as cutting down the grass every year, grubbing up the bushes, cutting down ash trees, &c. The bank in question was not used as a towing path in the navigation of the river, the path used for that purpose being on the opposite side. It was proved, that the defendant had, from time to time, made and repaired fences across the bank, down to the very edge of the water, for the purpose of keeping in his cattle, and protecting his lands from the trespasses of strangers. The learned Judge charged the Jury, that the question whether the plaintiff had the right of soil in the locus in quo or not, depended upon evidence of usage and enjoyment on the one side and the other. He called their attention to the lease which had been given in evidence, as affording a strong presumption that the right of soil in the bank belonged to the undertakers of the navigation. He put it to them to consider whether

1823.

HOLLIS v. GOLDFINCH.

the acts of ownership exercised by the defendant had not been explained by the evidence received on the part of the plaintiff, and finally he left it to them as a question of fact, taking the whole of the evidence on both sides into consideration, whether the plaintiff had made out his right to the soil of the bank. The Jury found their verdict for the plaintiff. It did not appear that the learned Judges' attention had been particularly called to the old act of Parliament above mentioned.

P. Williams, in *Trinity* Term, obtained a rule nisi for a new trial on three grounds, first, misdirection in point of law on the part of the learned Judge, who was represented to have told the Jury, that they might, in the absence of other evidence, presume an agreement to have been entered into between the former owners of the land, and the proprietors of the navigation, for the purchase of the soil in question; second, that evidence had been received which ought to have been rejected, namely, that of acts of ownership exercised by the plaintiff on other parts of the line of the river; and, third, that the verdict was against evidence. It was further contended, that the learned Judge did not sufficiently direct the attention of the Jury to the provisions of the 16 & 17 *Car.* 2, which it was insisted was in a great measure decisive of the question, inasmuch as no power was there given to the undertakers of the navigation to *purchase* the soil, the interest in which might, notwithstanding that act, still remain in the owners, though the undertakers might have the use of it for the purposes of the navigation.

The learned Judge, in his report of what passed at the trial, now stated, that he had not directed the Jury to presume as an abstract proposition, that an agreement had been originally entered into between the proprietors of the navigation, and the owner of the soil; but that, after reading

over the evidence, he had drawn their attention to what he considered to be the question at issue, namely, whether there were such acts of ownership proved on the part of the plaintiff, as justified them in coming to the conclusion, that the plaintiff had the right of soil in the locus in quo.

Gaselee (with whom were *Selwyn* and *E. Lawes*) now shewed cause against the rule. This being the second trial of the same cause, and the verdict on each occasion being the same way, the Court will not readily yield to an application for a third trial, unless there is some cogent ground made out for believing that injustice has been done to the defendant. On the former occasion when a new trial was granted, the Court thought there was so little foundation for the objections taken by the defendant, that they did not call upon the plaintiff's counsel to answer them, but merely granted a new trial, on the ground that certain witnesses had not been called whose evidence it was supposed might be of service to the defendant. The Jury, therefore, having found a verdict for the plaintiff a second time, notwithstanding the additional evidence, there must be some strong reason established for disturbing that verdict. As to the objection on the ground of misdirection, that completely fails, the learned Judge having reported that he did not direct the Jury to presume that an agreement had been made between the proprietors of the navigation and the owner of the land. The way in which that part of the case was put to the Jury, on behalf of the plaintiff, was, that by virtue of the 16 & 17 *Car.* 2, the predecessors of the plaintiff had authority to make an agreement with the proprietors of such land, as was necessary to make new cuts, and for other purposes connected with the navigation. Looking to the provision of that act of Parliament, it appears that the undertakers must necessarily be presumed to have authority to purchase the soil of the river and so much of the banks thereof as was necessary for rendering the river navigable. For this

1823.

HOLLIS v. GOLDFINCH.

purpose they had authority to make line ways not exceeding three feet on each side the river, and to remove all trees and other impediments. In this case the bank in question was artificial, being originally made of the soil dug from the new cut in which the river now flows. To this bank the plaintiff claims a right, and to every thing which grows upon it. The act of Parliament gives authority to the commissioners to make an award between the undertakers and the owners of the land respecting the right of soil, and it also authorizes agreements to be made between the parties, without regard to the adjudication of the commissioners. Here undoubtedly there was no proof of an award, nor was there any distinct evidence of an agreement, but the necessary presumption from the authority given by this statute is, that an agreement must have been entered into between the undertakers and all the proprietors of land on the line of the navigation. If that presumption reasonably arises from the nature of the case itself, acts of ownership and enjoyment in and upon the soil, afford cogent evidence in confirmation of it. Abundant evidence of that description was received on the part of the plaintiff. Much reliance, however, cannot be placed upon the provisions of this old act of Parliament, which was passed at a time when subjects of this nature were not so well understood as in modern times. But it is objected that evidence was received which ought to have been rejected, inasmuch as it was not competent for the plaintiff to give evidence of acts of ownership and enjoyment on other parts of the line of the canal beyond the locus in quo. If, however, there be reasonable presumption of an agreement between all the proprietors of lands and the undertakers, such evidence was clearly admissible, and the case will fall within the principle laid down in *Stanley* v. *White* (a). The Jury here must presume, as in that case, an unity of ownership and possession; and therefore evidence of enjoyment, on other

(a) 14 East, 332.

1823.

HOLLIS
v.
GOLDFINCH.

parts of the line of canal, was admissible in aid of the right claimed to the locus in quo. But even supposing evidence had been improperly received, that would be no ground for a new trial, if upon other parts of the case there was sufficient evidence to sustain the verdict. Upon the same principle the Court would not send the case to another trial, on the ground that evidence had been improperly rejected, if it appeared that the evidence so rejected would have no effect upon the verdict. For this, the case of *Tyrwhitt* v. *Wynne* (a) is an authority. In this respect the case must be governed by the principle acted upon in the Court of *Chancery*, when an application is made for a new trial, in a case in which the conscience of the Chancellor is to be satisfied. The Court is bound to consider that the Jury have come to the right conclusion. If, under all the circumstances of this case, the Court sees no reason to believe that the evidence received had no effect upon the verdict, they will not send the case to another trial. Here there was sufficient proof of acts of ownership to entitle the plaintiff at all events to a verdict. A great many witnesses were called to prove, that for a great number of years the plaintiff had exercised acts of ownership and enjoyment upon this bank, and therefore there was strong ground for presuming the right of soil in the plaintiff. Though the old act of Parliament may not in terms authorize a purchase of the soil, yet from the nature of things a purchase must be presumed, if there be nothing in the act to prevent it. It is a principle of law not inconsistent with this act of Parliament, that if the land be taken for the purposes of this navigation, the soil must be considered as passing. In the case of *Buckeridge* v. *Ingram* (b) it was held, that shares in a navigable canal are to be considered as real estate, and subject to dower. The presumption is, that the plaintiff had purchased every thing essential to the purposes of the navigation, and it cannot

(a) 2 Barn. & Ald. 554. (b) 2 Ves. sen. 652.

1823.

HOLLIS v. GOLDFINCH.

be doubted that this bank is necessary for that purpose. But in addition to the evidence of ownership and enjoyment, the lease which was given in evidence is decisive of this question. That lease shews that the owner of the adjoining land had no right to place the hatches and sluices upon the bank without the permission of the undertakers of the navigation, because if this were not so, there could have been no necessity for granting the lease. This fact gives judgment against the defendant, and taking all the other circumstances of the case into consideration, and recollecting that this question has been twice decided in favour of the plaintiff, there is no ground for sending the case to a new trial.

P. Williams and *Marett*, contrà, were stopped by the Court.

ABBOTT, C. J.—Two substantial grounds arise in this case, in support of the motion for a new trial; first, that evidence was received which ought to have been rejected, and second, that the case was not left to the Jury in a way which was likely to lead them to a correct conclusion upon the subject. My mind is perhaps not quite made up as to the admissibility of the evidence which has been objected to, but certainly this case is very different from the case of *Stanley* v. *White* (a). The difference between that case and this is, that there a strong presumption was raised, that all the land had originally belonged to one and the same person. That was the natural presumption arising from the circumstances of that case. Here, if there has been an acquisition of right in the soil on the banks of this river, it must have been made by the purchase of land belonging not merely to one owner, but to a great many different owners, no one of whom could have been compelled to part with his property under the act of Parliament. That certainly is a

(a) 14 East, 332.

1823.

HALLIS v. GOLDFINCH.

very important and material distinction between this case and that cited. But, assuming that all the evidence which has been adduced had been receivable, and taking the evidence on one side and the other, and considering it as evidence of ownership only, without reference to the original property in the soil, here is distinct proof made out of the enjoyment of the grass and herbage by the defendant for a long series of years, which is the evidence usually given of property in land. Supposing the enjoyment by cutting trees and bushes to be principally in the undertakers of the navigation, as the proprietors of the land; still it would be a question, whether evidence of enjoyment on the whole line of the river could have been received. I am inclined to think it could not. It appears, that the defendant's boundary fences and hedges ran down to the very edge of the canal, which is strong evidence that he has the property in the soil. That brings me to the consideration of the second objection. I think the question of ownership in the soil was not so distinctly presented to the Jury as it ought to have been. The ownership of the soil, if it ever existed in the plaintiff, must have existed under the act of Parliament; I do not say by virtue of it; because, if the ownership was acquired by virtue of the act, it is extraordinary to observe, that throughout this act of Parliament, to which our attention has been properly drawn, there is not one word directing any purchase of the soil, nor one word which directs that the soil is to become vested in the undertakers. It is said, that this act of Parliament, which was passed in the reign of *Charles* 2, was drawn up with less caution than acts of Parliament in modern times upon such subjects are generally drawn, and that therefore it ought not to receive a strict construction. Supposing that to be true, still it would have been just as easy to introduce a power of purchasing the soil, if such a power was intended to have been given, as to have expressed the statute in the terms in which it is framed. The words of

1823.

HOLLIS v. GOLDFINCH.

this act of Parliament are, that "the commissioners shall have power to say what and how much satisfaction every person shall have, in respect of any prejudice, loss, or damage by him sustained, or that may be sustained by him, for such proportion of his lands next adjoining to the navigation, as shall be made use of for bridges, ways, or passages, or by doing any thing appointed or consented to be done, by virtue of this act." Now if all that this act gave authority to do, had been done, namely, the completion of this navigation, there is no reason to suppose that the soil would have been purchased; for the sole object of the act might have been accomplished without any purchase of the soil whatever. The act certainly never contemplated any sale of the soil in the channel of these rivers, and the obligation to complete the navigation might very well exist, without the owner of the navigation being the owner of the soil over which the water flowed. If therefore it was not necessary that the ownership of the soil should be vested in the undertakers, what reason have we to suppose that, that which was not necessary to be done must have been done? The undertakers of the navigation are to make a compensation to the owners of the land adjoining, for any injury or damage sustained by them in the completion of the navigation; which does not necessarily import that all right of ownership in the land itself, is to be divested out of the proprietor of the soil through which the navigation is to be carried. There is nothing to lead my mind to suppose that a purchase of the soil in question could ever have taken place. I think that if this case had been presented to the Jury in this view of the act of Parliament, and their attention had been called to its original object, they would have come to a different conclusion. It may be observed, without entering into any more detail as to the provisions of the act of Parliament, that the lease which has been adverted to, puts this matter in a light still more favourable to the defendant. That lease, it is contended, is evidence that the

banks of the navigation belong to the lessor, who is the proprietor of the navigation. The great object of the lease professes to be a grant of so much of the water of the river as may be necessary for the irrigation of the land; for which purpose there is a demise of four hatches or sluices standing on the bank of the river. Now, for what purpose can those hatches have been made, but for the more convenient conveyance of water from the river through the banks to the adjoining lands? But it is said that this demise of the hatches imports that the hatches belonged to the lessor. Probably it does; but it is contended further, that as the hatches belong to the lessor, the bank must also belong to him. Now that is a conclusion which by no means follows. I take it that the hatches are unnecessary to the maintenance of the navigation, and that the undertaker would have no right to place the hatches there against the wishes of the owner of the land. This construction is greatly strengthened by the terms of one of the covenants of the lease, by which the lessee covenants for all time during the demise to permit and suffer the lessor, or his servants, as often as shall be necessary, for the navigation of the river, or the reparation thereof, to stop, shut down, draw, or open, or keep shut, or open, the hatches or sluices, for the purpose of maintaining the navigation; and there is a further provision, that the lessee shall, at the end of the term, make good the bank of the navigation where the hatches are placed. Giving to this lease the fullest effect which it is capable of receiving, I think it does not in any degree influence the case, or produce any conclusion unfavorable to the defendant. On these grounds, therefore, I think this case ought to go to another inquiry.

BAYLEY, J.—I am of the same opinion. It does not appear to me that the case was left to the Jury with reference to the act of Parliament, in the way in which it ought to have been left for their consideration; and I am strongly

1823.
HOLLIS
v.
GOLDFINCH.

disposed to think, that the evidence of acts of ownership on the other parts of this bank was, under the circumstances, improperly admitted. The act of Parliament gives to the commissioners power to do all acts that may be necessary for the purpose of making new channels, and provides that satisfaction shall be made from time to time in case any thing should be done to prejudice the rights of the owners of the adjoining lands. It provides, that under the power of making new channels, they have a right to excavate new cuts, and to make banks, in order to secure the water in the channels which are to be made. They are authorised not only to use the channels, but the adjoining land for any purpose that may be necessary to carry into effect the power which the act gives them. Under that act, which gives them no express power *to purchase,* they have a right to obtain every thing which would be beneficial to them for the purpose of carrying into effect the object in contemplation, and I think it was a matter fit to have been pressed upon the consideration of the Jury, that they had no express power to purchase, and therefore that the probability was, that the land in question never had been purchased. It is suggested in argument, on the part of the plaintiff, that even supposing the undertakers of the canal did not purchase the adjoining land, but were merely allowed to throw upon the adjoining banks the soil excavated from the channel, still that would give to the proprietor of the canal a right to what should be growing on the bank. That I deny. The proprietors of the canal would indeed be excused from the trespass they had committed in excavating the channel, and throwing the soil upon the adjoining land, because for that they would have made satisfaction to the owners of the adjoining land. They would be entitled to have the bank continued for all purposes for which it would be necessary to the navigation; but for the purpose of growing any thing upon that bank, they clearly had no right. As to the bank in question, it seems to me that the evidence of acts

1823.
HOLLIS
v.
GOLDFINCH.

of ownership, on the part of the plaintiff, was met by such strong acts of ownership on the part of the defendant, that I think the case for the defendant ought to have been pressed much more strongly upon the consideration of the Jury. I think it was most improbable that the plaintiff had ever made any purchase of the soil in question. The lease which was given in evidence, in my judgment, does not warrant the inference that the plaintiff was the proprietor of the soil, upon which the bank in question was erected, because it is evident that the sluices therein mentioned must have been originally made for the purpose of enabling the water to pass out of the canal to irrigate the adjoining land. Those sluices may originally have been erected by the proprietor of the canal for purposes connected with the use of the canal; they may have been made in the bank in order to draw off any superabundance of water. But the great object of the lease in question seems to have been to give to the proprietor of the adjoining land the use of the water of the canal for the purposes of irrigation, and so long as he got it conveyed to him in this manner, probably he would not be particularly anxious about the words of the conveyance. It appears to me therefore on the first question, that as the act of parliament gave no power to the undertakers to purchase the soil, the improbability of a purchase should have been pressed upon the consideration of the Jury. Upon the other point I am disposed to think, that the plaintiff was not at liberty to go into evidence of the exercise of acts of ownership upon other parts of the bank in question, but that the evidence should have been confined to what was done on this particular spot. The cases which have established that a party is at liberty to prove what has been done on one spot, in order that he may shew his right in another, are, I think, all referrable to this description of case, namely, where there is a reasonable probability (and that reasonable probability previously made out) that the whole line has been in one owner, and

1823.

HOLLIS v. GOLDFINCH.

that the ownership has been one and the same. That was the ground upon which the case of *Stanley* v. *White* was decided; and that is the principle upon which evidence of that description was rejected in the case of *Tyrwhitt* v. *Wynne*(a). I am not sure whether in the case of *Stanley* v. *White* the evidence ought to have been received upon the pleadings as they were at that time framed, because I am not certain whether the plaintiff in his replication in that case should not have stated that the trees were growing upon a certain district constituting one belt, and from that circumstance have stated that they were his trees; because that would have informed the defendant that the plaintiff meant to go into evidence of the description received. Whether I am right in this, I will not take upon myself to determine. But I am satisfied, that in looking through the cases on this subject, they all proceed upon the ground of an unity of ownership, and an unity of character, between the spot in question and the other parts of the estate with respect to which evidence is given. Now in this case there is no such unity of ownership, nor any such unity of character previously established. Here is the bank of a new cut, which in all human probability passes through the lands of many different persons. It is not necessary for the purposes of the navigation that the undertakers should purchase the soil; and, if it were, many persons might be willing to sell, and others might not. Some, for an adequate compensation, might be disposed to part with their land up to the very edge of the water, whilst others might refuse to give up a single inch. Is it to be supposed, that because nineteen persons have conveyed their freeholds up to the water's edge, the necessary inference is, that the twentieth has also conveyed his property in like manner? It seems to me that the plaintiff was not at liberty to go into evidence of any acts of ownership which he might have exercised on other parts of the line of this canal, until he had

(a) 2 Barn. & Ald. 554.

1823.



HOLLIS v. GOLDFINCH.

previously established that there was an unity of ownership and character in all the lands upon the banks. As no such unity of character and ownership was established, this rule must be made absolute.

HOLROYD, J.—The act of 16 & 17 *Car.* 2. appears to me to form a very important feature in the present case, in order to consider the effect of the evidence of acts of ownership upon which the plaintiff rests his title to the locus in quo, as raising a presumption that the soil was in him. In that point of view the effect of the provisions of the act should have been fully brought under the consideration of the Jury. There is nothing in this case inconsistent with the notion that the right of soil, through which the river *Ichen* passes, should exist in other persons totally independent of any of the powers given by act of parliament. The act authorizes the undertakers to compel other persons to allow the use of the land, through which the new cuts are to be carried, upon an adequate compensation given for that privilege, for all the purposes of navigation; but it is totally unnecessary for any beneficial purpose mentioned in the act, that the undertakers should become the purchasers of the soil. The presumption is against their doing so; for if the provisions of the act of Parliament are taken into consideration, the right of soil is wholly unconnected with the object which the legislature had in view. The act itself affords no ground for supposing that the purchase of the soil was necessary for any of the purposes therein mentioned. Then does the lease which has been given in evidence carry the case any further, so as to shew a right of soil in the plaintiff? I think it does not, and that the inference is the other way; because the lessor only grants the use of the water for a given time, and the sluices and hatches are only erected for the purpose of enabling the lessees to enjoy the benefit of the water in the irrigation of their lands. The sluices and hatches may be the pro-

1823.
HOLLIS
v.
GOLDFINCH.

perty of the plaintiff, as connected with the navigation, which is the primary object of the statute, but they afford no evidence of a right in the soil. As to the evidence of acts done by the plaintiff upon the banks of other parts of the line of navigation, I think such evidence was inadmissible, on this ground, that there was not any preliminary evidence to shew that this had been one property, and that there had been an unity of title previous to the acts of ownership and enjoyment upon which the plaintiff relies.

BEST, J.—It has been argued, that assuming we should be of opinion this verdict was not right, we ought not to send the case down to a new trial; and, in support of that argument, we have been referred to the course usually adopted in the Court of *Chancery*. Verdicts have a different effect in *Chancery* from what they have in this Court. In *Chancery* they are merely to inform the conscience of the Judge. Here they are to be acted upon in future as precedents and evidence of right between the parties; and it appears to me that we should be usurping the province of the Jury, if we were to suffer a verdict to stand where evidence was received which ought to have been rejected. It is impossible to say, in the view which we are bound to take of this case, that this verdict is right. I am satisfied, first, that evidence was received which ought to have been rejected; and, second, that the act of Parliament upon which the plaintiff relies, makes against, rather than for him. The statute of *Car.* 2. in my opinion, gives nothing like a right to purchase the soil. It is said we may presume an agreement between the parties for the purchase of the locus in quo, by connecting the acts of ownership with the provisions of the statute. Nobody who looks attentively at the statute can suppose that it raises any such presumption; and as to the acts of ownership, they are completely met by the evidence on the part of the defendant. I think the act of Parliament gives nothing to the undertakers of this canal but the right of

making towing-paths, and using such paths merely for the purposes of the navigation, giving to the owners of the soil a compensation for any damage they may sustain from such an appropriation of their land. It is said that this possession of the banks for the purposes of navigation gives the plaintiff a right of soil in the land, and consequently a right of appropriating to himself the produce of the land. That proposition can never be considered as law in this Court. Allusion has been made to modern acts of parliament, but I think we shall arrive at a sounder construction of this case, by confining our attention to the older statutes. The act 23 *Hen.* 8. c. 5. appointing commissioners of sewers, contains terms nearly similar to those contained in the statute now under consideration. Is it to be contended that the commissioners of sewers have any interest in the soil under the powers of their commission? It is distinctly stated by *Callis* (a), in his reading on the Statute of Sewers, that they certainly have not, and that opinion has been recently acted upon. The commissioners have the use of the water, and may erect walls and make banks; but *Callis* takes a distinction between a wall erected by the commissioners, and a bank erected by them, and says, as to the latter, the property and ownership is in him whose grounds adjoin thereto. This doctrine was recognized in the case of *The Duke of Newcastle* v. *Clark* (b), where it was held, that the commissioners of sewers have not such a possession of a wall or dam erected by them as will entitle them to maintain an action of trespass. If the commissioners of sewers have not such a possession of their banks and walls as will enable them to maintain trespass, I apprehend it is clear that under this act of Parliament, which contains terms exactly similar to those of the Statute of Sewers, the plaintiff cannot maintain this action. I think this act of Parliament ought to have been presented to the attention of the Jury, and that the attention of the learned

(a) Page 52, 1st 4to edition. (b) 2 J. B. Moore, 666.

1823.

HOLLIS v. GOLDFINCH.

Judge ought to have been called more particularly to its provisions. It is not for me to say what will be the effect of it when submitted to another Jury, but the plaintiff will have to contend for a right of soil dehors the act; because I apprehend he will have some difficulty in contending that any right of soil is given by the act itself. I concur with my Lord Chief Justice and my learned Brothers in the reasons they have given why the evidence which has been received ought to have been rejected, and therefore this rule ought to be made absolute.

Rule absolute.

Wednesday, Jan. 29.

GUNSON and Others, Assignees of GOLDIE *v.* METZ.

Assignees of a bankrupt declared as indorsees against drawer of a bill of exchange, and to prove notice to the latter of the dishonor by the acceptor, it was held that an agreement between the drawer and *K.*, (an intermediate indorsee) reciting that the bill in question was, amongst other bills, to which the drawer was a party, *overdue*, and was, or ought to be in the hands of *K.*, was evidence to satisfy the averment of due notice of dishonor to the drawer, though the assignees were no parties to the agreement:—Held also, that the assignees were not bound to prove in fact that they were assignees, though they declared in that character.

ASSUMPSIT by indorsees against drawer of a bill of exchange. At the trial before *Abbott*, C. J., at the *London* adjourned Sittings after last Term, the case was this: The bill in question for 160*l.* dated 18th *September*, 1816, at twelve months, was drawn by the defendant upon and accepted by *Edward Serrate*, indorsed by the defendant to *John Kinnear*, and by him to the plaintiffs. The plaintiffs proved a primâ facie case as indorsees. The declaration averred a presentment to, and dishonor by, the acceptor, and due notice thereof to the defendant, but no evidence was offered in support of the latter averment. To supply this deficiency of proof, the plaintiffs produced an agreement, dated 15th *May*, 1818, between *Kinnear* and the defendant, by which, after reciting that the bill in question, and certain other bills drawn by the defendant, "were then all of them over due, and were, or ought to be in the hands of *Kinnear*," it was agreed that *Kinnear* should accept

1823.

GUNSON v. METZ.

payment for all the bills by weekly instalments from the defendant; and it was contended, that as this instrument was dated eight months after the dishonor of the bill, and expressly described the bill as then over due, and provided a mode of satisfying the claim upon the defendant in respect of it, in effect it amounted to a waiver of the notice to him of the dishonor of the bill, and thereby relieved the plaintiffs from the necessity of proving such notice. For the defendant, it was contended, that this did not amount to a waiver of notice as between these parties, and it was further objected, that as the plaintiffs had declared as assignees of a bankrupt, they were bound to prove that they really stood in that character. The learned Judge, however, over-ruled both objections, and directed a verdict for the plaintiffs, with liberty to the defendant to move to enter a nonsuit.

Platt now moved accordingly, and relied upon both points. The agreement put in was no waiver of the plaintiff's laches in not proving the notice to defendant of the dishonor of the bill. In the first place, it had not for its object the making any such concession, but merely mentioned the bill in question in its recital, with a view to an accommodation upon other matters between the parties to the agreement; and in the next, the plaintiffs were no parties to it, nor was the promise to pay this bill, if any such promise it contained, made to the plaintiffs, but to a third person not then the holder of the bill; and in every one of the cases in which a subsequent promise to pay by the drawer, has been held to be a waiver of laches, the promise has been given to the *then actual holder* of the bill. It has been decided, that an agreement between the parties to a bill that it should not be put in suit till certain estates were sold, was no excuse for want of notice of non-payment, *Free* v. *Hawkins* (a); which is as nearly as

(a) 1 Holt's N. P. 550.

1823.
GUNSON
v.
METZ.

possible the present case; and upon this principle therefore the verdict was clearly wrong. Then, as to the second objection, the plaintiffs were clearly bound to prove that they actually filled the character in which they brought their action; and therefore some evidence that they were assignees of *Goldie* was absolutely necessary. It is true that the bill was indorsed to them as such assignees, but that was immaterial; they chose to appear upon the record as assignees, and therefore they were bound to prove in point of fact that they were so.

Per Curiam.—Neither of these objections affords any ground for setting aside the verdict in this case. Upon the first, the question whether the agreement was a waiver of the want of notice of dishonor does not arise, because the bill itself being set out specifically in the agreement as then over due, was evidence of actual notice of its dishonor; for how could the defendant know it to be over due, unless he also knew it to have been dishonored? There was, therefore, sufficient evidence that the defendant had received notice that the bill was dishonored. Upon the second,—evidence of the plaintiffs right to sue as assignees was perfectly unnecessary, because as the contract upon which they sued was made after the bankruptcy, they were not bound to sue as assignees, but might have brought the action in their own name; and consequently all that relates to their characters as assignees may be treated as surplusage, and struck out of the declaration without at all impairing their claim in the present action.

Rule refused (*a*).

(*a*) Vide *Evans* v. *Man*, Cowp. 569.

1823.

Langdale and Others *v.* Parry the Elder.

Wednesday, Jan. 29.

A. writes orders to *B.* for the delivery of goods to *C.*, which are accordingly delivered to the latter upon the credit of the former. The usual credit of the trade is four months, and the bills of parcels are made out in the name of *C.* The period of credit is enlarged from time to time without the knowledge of *A.*; and *C.* becoming bankrupt, *B.* proves the amount of the goods under the commission, which exceeds more than two-fifths of *C.*'s debts, and signs his certificate without any communication with *A.*, who at the time of the bankruptcy is abroad, and does not return to this country until eight years afterwards:—Held that *A.* was still liable as surety for *C.* to *B.*

ASSUMPSIT upon several guaranties given by the defendant, to pay for goods sold and delivered by the plaintiffs to his son. Plea, non assumpsit. At the trial before *Abbott*, C. J. at the *London* adjourned Sittings after last Term, the cause was tried upon admissions, stating the following facts:—In 1813-14, *Joseph Parry* the younger, carried on the business of a distiller in *Hatfield-street.* The plaintiffs, who were wholesale distillers, supplied him from time to time with spirituous liquors, in consequence of notes or orders written on his behalf to the plaintiffs by the defendant, in the following terms:—

Gentlemen.—Please to deliver two pipes of spirits for Mr. *Joseph Parry* of *Hatfield-street,* and will oblige,

Gentlemen, your humble Servant,

J. Parry.

Messrs. *Leader* and *Co.*

Other notes or orders were similar in substance, only saying "for the distillery in *Hatfield-street.*" Upon these notes or orders the plaintiffs declared as upon guaranties to pay the debt of *Joseph Parry* the younger; who in *November* 1814, became bankrupt, at which time he was indebted to the plaintiffs in a sum of 1972*l.* 16*s.* 3*d.* The usual credit given in the plaintiff's business was, four months. The amount of debt above mentioned had been contracted by *Joseph Parry* the younger, during the whole period he was in business, and no payment had been made by him to the plaintiffs in that interval. The delay of payment and elongation of credit for the goods, had taken place without the knowledge of the defendant; all the bills of parcels

1823.

LANGDALE v. PARRY.

had been made out in the name of *Joseph Parry* the younger. The plaintiffs proved the whole amount of their debt under the commission of bankrupt issued against *Joseph Parry* the younger, as a debt due from him to them, upon an affidavit for goods sold and delivered, and received dividends from his estate, by which the balance due to them was reduced to 1551*l.* 7*s.* 11*d.*, and signed his certificate without any communication with the defendant, which certificate was afterwards allowed by the Lord Chancellor. The debt so proved by the plaintiffs amounted to more than two-fifths of all the debts proved under the commission. The plaintiffs were unable to arrest the defendant until the month of *September* 1821, he having been abroad from the eve of the bankruptcy until that time, but the plaintiffs had sued out a writ to avoid the statute of Limitations. The sum sought to be recovered in this action was 1551*l.* 7*s.* 11*d.* the balance due to the plaintiffs at the time of granting the certificate to *Joseph Parry* the younger. Under these circumstances, the question was, whether the defendant was liable upon the guaranties above mentioned, and the learned Judge being of opinion that he was, the plaintiffs had a verdict.

Patteson, now moved for a rule to shew cause why the verdict should not be set aside, and a nonsuit entered, upon two grounds; first, that the plaintiffs having proved their whole debt under the commission against their principal debtor, and signed his certificate, without the consent of the defendant who was only surety, had thereby discharged him from his liability upon the guaranties; and second, that the notes on which the action was brought did not amount to guaranties in point of law, but were mere orders for the delivery of goods without any promise to pay for them. As to the first point; as the plaintiffs were creditors for more than two-fifths of the whole amount proved under the commission, the certificate could not have been obtained

1823.

LANGDALE v. PARRY.

without their signatures, and the act of signing it therefore, was voluntary on their part. In the year 1814, they elected the principal as their debtor, laid by for a period of eight years, and then came upon the surety. Under such circumstances, the law would hold that they had discharged the surety, and for two substantial reasons; first, that if the creditor in such a case were allowed to sue the surety, the surety might afterwards in his turn sue the principal, and the result would be, that the creditor might in effect sue the principal in direct violation of his certificate; and second, that as the surety had a right to inforce against the principal all the claims which the creditor had against him, the creditor by giving up any of those claims, prejudiced the surety, and thereby discharged him from his original liability. There was no decided case precisely in point with the present, but the argument contended for, seems to have been admitted in several cases; *Ex parte Wilson* (*a*), *Mead* v. *Braham* (*b*), and *Ex parte Hughes* (*c*); for not one of these goes the length of determining, that the creditor has a right to go out of his way to discharge the principal to the prejudice of the surety. The statute 49 *Geo.* 3. c. 121. s. 14. seems also to sustain the present argument, for it is there said, that the proving or claiming a debt under a commission of bankrupt by any creditor, is to be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed by him. With respect to the second ground, the notes upon which the plaintiffs had declared, did not amount to legal guaranties, inasmuch as they did not contain any express promise to pay for the goods ordered; their language was only "please to deliver for Mr. *Joseph Parry*," or "for the distillery at *Hatfield-street*." There is not only no promise by the defendant to pay or secure payment, but a specific reference to another person for that purpose, whereas the declaration averred a promise by the defendant to be an-

(*a*) 11 Ves. 410. (*b*) 3 M. & S. 91. (*c*) 5 B. & A. 482.

1823.
LANGDALE v. PARRY.

swerable for the debt of his son. Upon both these grounds therefore, but relying more particularly upon the first, the defendant was exempted from all liability, and a nonsuit must follow.

Per Curiam.—There is no weight in either of the objections taken in this case. With respect to the first, which is the more general question, it is not necessary upon the present occasion to decide, whether a creditor who proves his debt under a commission issued against his principal debtor, and afterwards enables him to obtain his certificate, behind the back of the surety, does or does not in any case discharge the surety; because there are circumstances in this case which might well take it out of any general rule upon the subject. The surety here absents himself, and is not to be found for a period of eight years, and it would be too much to say, that a bankrupt who conducts himself well, is to be deprived of all chance of obtaining his certificate, and reinstating himself in business during so long a time, merely for the sake of a man who has become his surety. The statute which has been cited does not support the argument, because it applies wholly to debts between the creditor and the bankrupt; and has no relation whatever to the case of a surety. The second objection is equally untenable; the notes in question are positive orders by *A.* for the delivery of goods to *B.*, and the necessary effect of them, both in law and in common sense, is either to make *A.* the principal debtor for, or in the place of *B.*, or to make him answerable for the debt, if *B.* should make default.

Rule refused.

The KING v. JOHN WEBB HALL.

Wednesday, Jan. 29.

The defendant in a quo warranto information against him, to shew by what authority he holds the office of registrar and clerk, of the Court of Requests, of the city of *Bristol*, is not entitled to costs under the statute, 9 *Anne*, c. 20. s. 5.

AN information in the nature of quo warranto having been filed against the defendant, calling upon him to shew by what authority he exercised the office of registrar, and clerk to the Court of Requests, of the city of *Bristol*, and a special case having been made, and judgment given thereon for the defendant (*a*),

Adam now moved for a rule to shew cause why it should not be referred to the Master of the Crown Office, to tax the defendant his costs of the prosecution. He contended that this was a case within the statute 9 *Anne*, c. 20. s. 5. That section provided, that "in case any person against whom any information or informations in the nature of a quo warranto had been filed, should be found guilty of an usurpation of the said offices or franchises, it should be lawful for the Court, as well to give judgment of ouster against such person or persons, of and from any of the said offices or franchises, as to fine such person or persons respectively, for the usurpation of any of the said offices or franchises; and also it should be lawful for the Court to give judgment, that the relator or relators in such information named, should recover his or their costs of such prosecution, and if judgment should be given for the defendant or defendants in such information, he or they for whom such judgment should be given, should recover his or their costs therein expended against such relator or relators." Now, this case came at least within the words of the statute, inasmuch as the defendant held an "office," which was one of the terms used in the 5th section. The information has been

(*a*) Vide ante, 248.

1823.

The King v. Hall.

filed against the defendant under colour of this statute, and it is at least reasonable that the relator should be subjected to the costs of the proceeding. Supposing the case not to be within the statute, still, if the relator availed himself of a quo warranto information, instead of proceeding by action, he ought to be in no better situation than he would have been, had he resorted to the latter mode of proceeding, by which the successful party would have been entitled to his costs. Here the relator proceeded under colour of the statute, and as a consequence, he subjected himself to the liabilities which the statute imposed. There was no case in the books, in which costs had been refused to a defendant in a quo warranto information. This question, however, has been discussed with reference to a claim of costs in the case of a successful relator, in *Rex* v. *Williams* (a) and *Rex* v. *Wallis* (b), where the Court considered the effect and meaning of the word "offices" or "franchises." It was for the Court, in this case, to determine whether the office of register, and clerk of the Court of Requests was an office within the meaning of the statute.

Abbott, C. J.—I am of opinion that this is not a case within the statute, as is obvious when we look to the preamble, in connection with the clause which gives costs. The preamble recites "that divers persons had illegally intruded themselves into, and had taken upon themselves to execute the *offices* of mayors, bailiffs, port-reeves, and *other offices*, and whereas divers persons who had a right to such offices, or to be burgesses or freemen of such cities, towns corporate, boroughs, or places, had either been illegally turned out of the same, or had been refused to be admitted thereto, having, in many of the said cases, no other remedy to procure themselves to be respectively admitted or restored to their said offices or franchises, of being burgesses or freemen, than by writs of mandamus, the proceedings on which are very dila-

(a) 1 Burr. 402. (b) 5 T. R. 375.

tory and expensive;" and then proceeds to enact a remedy. The preamble speaks of mayors, bailiffs, port-reeves, and *other offices*, and of cities, towns, &c. or other *places*. It has been held, that the word "*places*," is ejusdem generis, with cities, towns corporate, and boroughs, and by the same rule, I think "*other offices*," mean other offices of the same kind, with mayors, bailiffs, and port-reeves, that is to say "other corporate offices." The party must be a borough officer, which this defendant clearly is not. As the defendant does not bring himself within the words of this act of Parliament, he is not entitled to his costs.

1823.
The King v. Hall.

BAYLEY, HOLROYD, and BEST, J.'s, concurred.

Rule refused (*a*).

(*a*) Vide *Rex* v. *Thatcher*, ante, vol. i. p. 426. and *Rex* v. *Highmore*, id. 438.

HALLETT *v.* MOUNTSTEPHEN.

Friday, Jan. 31.

Declaration in debt by the assignee of a surety bond in replevin, set out the condition, which was, "if *B.* appeared at the then next county Court, and there prosecuted his suit without delay against *I.* the bond to be void;" averment, "that *B.* did not appear, &c." Plea, first, non est factum, and issue thereon; second, "that *B.* did appear and prosecute, &c.;" and third "that *B.* did appear at the then next county Court, and prosecute, &c., and which said suit *is still depending and undetermined.*" Replication to the second and third pleas, traversing the appearance and prosecuting of the suit, but not traversing the allegation that the suit was *still depending and undetermined*, and issue on the replication:—Held, on these pleadings, that an agreement (which was made a rule of this Court) between plaintiff and the principal to stay all proceedings in the replevin, upon payment by the latter of a certain sum of money, each party to pay his own costs, was admissible evidence to negative the allegation in the third plea, that the suit was *still depending and undetermined*, and that the surety was not discharged by such agreement, after breach by the principal, but was liable for such sum as appeared upon a reference, to be due.

DEBT by the assignee against one of the sureties in a replevin bond. The declaration set out the bond, the condition of which was, "that if the said *A. B.* did appear at the then next county Court, to be holden at, &c., and there prosecute with effect, and without delay, his suit which he had commenced against the said *W. I.*, and the said plaintiff, for the taking and unjustly detaining, &c." then the bond

1823.
HALLETT v. MOUNT-STEPHEN.

to be void; and alleged, "that the said *A.B.* did not appear, &c.," in the words of the condition; "whereby, &c.;" concluding in the usual form. Plea, first, non est factum, upon which issue was joined; second, "that the said *A. B.* did appear, &c. and prosecute, &c.." in the language of the declaration; and third, "that the said *A. B.* did appear at the said then next county Court, and prosecute, &c., and *which said suit is still depending and undetermined.*" Replication to the second and third pleas, traversing the appearance and prosecution of the suit, but not traversing the allegation that the suit was "*still depending and undetermined;*" and issue on the replication.

At the trial before *Park*, J. at the last *Lent* assizes for the county of *Devon*, it appeared in evidence that the plaintiff having distrained upon a Mr. *Butler*, his tenant, for rent in arrear, the latter executed a replevin bond, to which the defendant became a surety. The replevin issued on the 8th of *March*, 1821; at the next county Court on the 20th of the same month the replevin and the bond were regularly filed, the plaint was entered, and the defendant below appeared. At the next Court in *April*, the plaintiff below filed his declaration, and gave a rule to avow; at the same Court the defendant below brought a re. fa. lo. and the cause was removed into this Court. On the 21st of *August*, 1821, an agreement was entered into between the present plaintiff and Mr. *Butler*, to stay all proceedings, upon payment by the latter of a sum of 250*l.* each party paying his own costs, which agreement was in *Michaelmas* Term following made a rule of this Court. Under these circumstances it was contended, that no evidence had been given of any breach of the condition of the bond, for non constat, but the suit was "still depending and undetermined," and consequently that the defendant was entitled to a verdict, and the learned Judge directed the Jury to find for the defendant, with liberty to the plaintiff to move to set that verdict aside and enter a verdict the other way.

Adam, in *Easter* Term last, obtained a rule nisi upon the point reserved, and

R. Bayley now shewed cause, and contended, that, upon these pleadings the defendant was in law entitled to a verdict. Issue was joined upon the replication to the second and third pleas. Now, the third plea alleged, that the replevin suit was still depending in the county court, which allegation was not traversed by the replication, and consequently that appeared as an admitted fact upon the record. If the contrary was the fact, it lay upon the plaintiff to traverse that fact, and in the absence of any such traverse, it must be taken that the suit was still depending, and consequently no breach of the bond had been committed, and the defendant could not be liable in this action. He cited *Brackenbury* v. *Pell* (*a*) as an authority directly in point. Admitting that an agreement had been entered into between *Butler* and the plaintiff, to stay all proceedings upon payment by *Butler* of a sum of 250*l.*, &c., still that would not be binding upon the defendant who was no party to the agreement, it being made behind his back. The agreement had the effect of changing altogether the relative situation of the parties, and might subject the defendant by such an arrangement to the payment, perhaps, of a much larger sum than he would be liable for, if the suit had regularly gone on to an end. The defendant had a right further to contend, that he, as surety, was discharged in consequence of the agreement between the plaintiff and his principal. He cited *The Duke of Ormond* v. *Bierly* (*b*).

Adam, in support of the rule, produced an affidavit verifying a rule of Court, (which he also produced) as having been given in evidence at the trial, and which embodied within it an agreement entered into between the plaintiff and Mr. *Butler*, dated 21st *August*, 1821, by which it was

(*a*) 12 East, 585. (*b*) Carth. 519.

1823.

HALLETT v. MOUNT-STEPHEN.

among other things agreed, that all proceedings in the former action should cease, that *Butler* should pay the plaintiff a sum of 250*l.* that each party should pay his own costs, and that the replevin bond should stand as a security for the observance of these terms. He contended, therefore, that after the making of that agreement, the suit was in fact at an end, and the defendant could not aver that Mr. *Butler* had prosecuted it with effect; and

The Court being of that opinion, said they had, under these circumstances, no alternative, but to make the rule absolute. The case was very clear. The issue was, whether the suit had been prosecuted with effect. If that were so, it was the duty of the defendant to have produced the record, to shew what the judgment had been. The agreement produced shewed that the suit was not still depending, but had been determined on the terms therein mentioned, which not having been carried into effect by *Butler*, the defendant became liable as surety. The objection as to the amount agreed to be paid by *Butler* went to the quantum of damage only. The amount which the surety might be bound to pay, was a matter for consideration hereafter, because *Butler* could not bind him absolutely to pay the sum of 250*l.* The objection that the surety was discharged by the agreement with the principal, did not apply to a bond of this description. The verdict, therefore, should be for the plaintiff, but the sum for which it should be entered might be settled out of Court.

Rule absolute.

STUDDY v. SANDERS and Others.

Friday, Jan. 31.

In an action against three defendants, as partners, the office copy of an answer to a bill in *Chancery*, filed by one against the others, is admissible evidence, without producing the original, in order to establish the partnership; and to prove the identity of the defendants, the clerk of their solicitor is a competent witness to that fact, though he knows nothing of the defendants but from his intercourse with them professionally in the conduct of the suit in *Chancery*.

ASSUMPSIT for goods sold and delivered. At the trial before *Park*, J. at the last *Lent* Assizes for the county of *Devon*, it appeared that the transactions which gave rise to the action, were founded upon the following agreement, which was set out in the declaration. "It is agreed on this 29th day of *October*, 1819, between *T. B. Studdy*, of, &c. and *W. Sanders* and *Co.*, of, &c. cider merchants, that the aforesaid *Studdy* has sold his cider at 35*s.* per hogshead, to be delivered at *Totness* in the spring of the year 1820; and the cider or wine pipes that he has empty, for the use of the said cider to be manufactured in premises of his the said *Studdy*'s, and for the lend of such casks the aforesaid *Sanders* and *Co.* to pay 1*s.* per hogshead in addition to the aforesaid 35*s.* (in all 36*s.* per hogshead); and the said 36*s.* per hogshead is to be paid one moiety at *Christmas* next, and the other half before the cider or any part is taken from the said *Studdy*'s premises. Witness our hands. Signed *T. B. Studdy; W. Sanders* and *Co.*" This agreement having been proved, it was proposed on the part of the plaintiff, in order to prove the partnership of the defendants at the time of its date, to put in evidence an office copy of the answer of the defendants *Lewis* and *Brettell*, to a bill filed by the defendant *Sanders* in the Court of *Chancery*, in *Michaelmas* Term 1820, the object of which was to compel them to give an account of their dealings and transactions as cider dealers and partners with him. This evidence was objected to on the part of the defendants, on the ground that it was incumbent on the plaintiff, either to produce the original answer, and prove the hand-writing of the parties to it, or if the office copy only was produced, to prove that the supposed parties to the suit in *Chancery* were

1823.
STUDDY v. SANDERS.

the same identical persons who were the defendants on this record. The learned Judge having yielded to this objection, a clerk of the solicitor, who had conducted the suit in *Chancery*, was called to identify the defendants as the parties to both suits; but it appearing that his knowledge of the fact arose wholly from communications with the defendants, it was objected that, as a confidential communication from a client to his solicitor, this evidence also was inadmissible, and the learned Judge thinking that objection also well founded, both the documentary and parol evidence was rejected. The plaintiff being unable to establish the partnership of the defendants by any other means, the learned Judge directed a nonsuit, reserving to the plaintiff the liberty to move to set aside the nonsuit, if the Court should be of opinion that the evidence ought to have been received.

Adam, in *Easter* Term last, moved accordingly, citing the case of *Hennell* v. *Lyon* (*a*), and obtained a rule nisi; and

Gaselee now shewed cause. It seems difficult to assign any satisfactory reason why a different rule should govern the admission of evidence of this nature, in a civil action, to that which prevails in criminal prosecutions; or why the office copy of an answer to a bill should be admitted upon slighter proofs of its authenticity than depositions in the Court of *Chancery* would be. Now, as regards the former case, it is clear, that, in a prosecution for perjury, proof of the defendants hand-writing to the answer is indispensible, *Rex* v. *Morris* (*b*), and *Rex* v. *Benson* (*c*); and as to the latter, office copies of depositions are not admissible in a court of common law without examination with the roll (*d*). Upon these authorities it seems clear, that the

(*a*) 1 Barn. & Ald. 182.
(*b*) 2 Burr. 1189.
(*c*) 2 Campb. 508.
(*d*) Gilb. Evid. 21.

1823.

STUDDY v. SANDERS.

documentary evidence in this case was properly rejected. Then as to the parol evidence, its very nature shews its inadmissibility. The clerk of the defendants attorney is called to prove that *A.*, *B.*, and *C.*, are the defendants in the present action, and that the same *A.*, *B.*, and *C.*, were parties to a certain suit in *Chancery*, his knowledge of each fact arising from the communication of the parties to him in his character of attorney's clerk. This must be considered a confidential communication made by a client to his attorney, and as such was protected from disclosure, and consequently was inadmissible as evidence. Upon both grounds therefore the learned Judge was correct in the course he took at the trial, and this rule ought to be discharged.

Adam, in support of the rule, was stopt, and

Per Curiam.—Both the parol and documentary evidence which was rejected at the trial of this cause ought to have been received; and therefore the rule for a new trial must be made absolute. With regard to the former, it cannot be said that the testimony offered, as to the bare fact that the parties to a particular suit in *Chancery* were also the parties to the suit then before the Court, was in the nature of a confidential communication between attorney and client, because it was a fact easily cognizable to the witness and to many other persons, without any confidence on the subject being reposed in him. As respects the documentary evidence, the case of *Hennell* v. *Lyon* seems to be altogether a parallel case to the present, and there is no ground for contravening that decision.

Rule absolute (*a*).

(*a*) Vide *Doe* v. *Andrews*, Cowp. 846. *Hodgkinson* v. *Wallis*, 3 Camp. 405. and *Whaley* v. *Manheim*, 3 Esp. 608.

1823.



Saturday, Feb. 1.

DOSWELL *v.* IMPEY, Esq. and Others.

Trespass will not lie against commissioners of bankrupt for committing a witness to prison for not satisfactorily answering questions put to him whilst under examination, even though the questions may appear to this Court to have been satisfactorily answered.

TRESPASS for an assault and false imprisonment. Pleas, first, Not Guilty; second, a justification, that defendants being appointed commissioners under a commission of bankrupt sued out against one *John Sheriffe*; plaintiff being suspected of concealing the property of the said *J. S.*, appeared before them to be examined concerning the effects of the said *J. S.*, when certain questions were put to him; (setting out the questions and the answers thereto); and that plaintiff's answers not being satisfactory to defendants, they as such commissioners issued their warrant and committed plaintiff to *Newgate*, until he should make satisfactory answers to the said questions, as they lawfully might do; third, a similar plea, not setting out the questions and answers; fourth, a justification under the statute 13 *Eliz.*; and fifth, the same under the statute 1 *Jac.* 1. Replication, to the first plea, a similiter; to the second and third, a general demurrer; and to the latter a special demurrer: That the said third plea, does not state on what grounds, and for what reasons the said plaintiff was suspected of concealing the said *John Sheriffe*'s property, nor what was the nature of the questions and answers in the said third plea mentioned, nor the grounds or reasons why the said answers were not satisfactory to the said defendants; and to the fourth and fifth, de sua injuriâ absque ullâ tali causâ. Rejoinder, and joinder in demurrer.

This case was argued in *Easter* Term last, by *E. Lawes*, in support of the demurrer, who contended that the pleas were insufficient and that the action was maintainable. There were two questions before the Court; first, whether an action of *trespass* was maintainable under any circum-

stances against commissioners of bankrupt, for *any* act done by them in their character of commissioners; and second, whether such an action was maintainable against them for a commitment professedly made out, on the ground that the party had given *unsatisfactory* answers, if those answers should, in the opinion of the Court, turn out to be *satisfactory*? On the first question, in order to give the defendants the immunity claimed in these pleas, they must be armed with all the authority of a Judge of a Court of Record. But it is impossible to say that commissioners of bankrupt are, in any sense of the word, Judges. Commissioners of bankrupt are removable by the Lord Chancellor, which the Judges are not; the oath taken by the former is of a very different and less important character than that required to be taken by the latter; Judges have a power of commitment for the purpose of punishment, which commissioners of bankrupt have not. All the distinguishing characteristics which protect the Judges in the execution of their office, are wanting to commissioners of bankrupt, and they are therefore to be considered only like other men, to be protected while they act within the law, but to be held amenable to the law when they transgress or strain it. Like other men, even though they act conscientiously, they are liable to mistake their powers; and is a man to be imprisoned in consequence of their error, and to have no remedy for the injury he sustains? In support of this part of the argument, he cited Doctor *Groenvelt*'s case (*a*), *Rex* v. *The Inhabitants of Glamorganshire* (*b*), *Ex parte Scarth* (*c*), *Brittain* v. *Kinnaird* (*d*), Doctor *Bonham*'s case (*e*), 4 *Inst.* 277. *Rooke*'s case (*f*), *Terry* v. *Huntingdon* (g), *Welch* v. *Nash* (*h*), *Bray*'s case (*i*), *Gregory*'s case (*j*), *Farr*'s case (*k*), *Perkins*

(*a*) 1 Lord Raym. 454.
(*b*) Id. 580.
(*c*) 14 Ves. 404. S. C. 15 Ves. 296.
(*d*) 1 Brod. & Bing. 439.
(*e*) 8 Co. Rep. 121 a.
(*f*) 5 Co. 100 a.
(*g*) Hardr. 480.
(*h*) 8 East, 394.
(*i*) 1 Lord Raym. 153.
(*j*) 5 Mod. 368.
(*k*) 9 Ves. 513.

1823.

DOSWELL v. IMPEY.

v. *Proctor* (*a*), *Bray*'s case (*b*), *Dyer* v. *Missing* (*c*), *Miller* v. *Seare* (*d*), *Morgan* v. *Hughes* (*e*), *Danger* v. *Hendship* (*f*), *Battye* v. *Gresley* (*g*), *Davie* v. *Mitford* (*h*), and *Ex parte Oliver* (*i*). Then as to the second point; this Court will inquire into the grounds of commitment, and form their own judgment whether the answers were such as the commissioners ought in reason to have deemed satisfactory. If the commissioners possess an arbitrary and conclusive right of decision on this point, the liberty of the subject is gone; and a man who from lapse of memory, or absolute ignorance on the subject inquired into, or from the nature of the questions put to him, which may render it impossible for any man to answer them, may be committed as if he had been guilty of wilful prevarication or corrupt perjury.

Parke, contrà, was to have argued for the defendant.

ABBOTT, C. J.—In this case the counsel in support of the demurrer has been heard, and upon his argument two important questions have been raised; first, whether an action of trespass can be maintained against commissioners of bankrupt for committing a witness who has given unsatisfactory answers to questions put to him by them; and second, whether such action can be maintained, supposing the answers should appear to this Court to have been satisfactory, as it has been argued that they were. We have considered both these questions, and the cases cited in reference to them, and we are all of opinion, that in either case, no action can be maintained. It becomes unnecessary therefore, to hear any further argument, nor is it necessary now to inquire whether the answers were or were not such as should have been deemed satisfactory by the commis-

(*a*) 2 Wils. 382.
(*b*) Comb. 390.
(*c*) Sir W. Bl. 1035.
(*d*) Id. 1141.
(*e*) 2 T. R. 225.
(*f*) 2 Wils. 386.
(*g*) 8 East, 319.
(*h*) 4 B. & A. 356.
(*i*) 2 Ves. & Bea. 219.

sioners. The general rule of law undoubtedly is, that trespass may be maintained against all persons holding a limited authority, (and commissioners of bankrupt clearly hold a limited authority only) for if they do any act beyond their authority, they certainly subject themselves to an action of trespass. But whether the act done, be or be not beyond their authority, is always the question. This rule is laid down in the case of *Miller* v. *Seare*, and in some other cases. But is the authority of commissioners of bankrupt to commit persons brought before them, whose answers they deem unsatisfactory, inconsistent with the general rule of law I have mentioned? The question here is, whether the commitment by commissioners of bankrupt of a party, whom they have authority to summon before them, for not answering to their satisfaction lawful questions, is warranted by law; and the answer to that question must be sought for, and will, we think, be found in the statute under which this commitment took place; comparing that statute with the preceding enactments on the same subject. Former decisions of this Court have, and ought to have, very considerable weight with us, but where decisions are quoted which appear to us to be contrary to the true intent and meaning of the statute, they ought not and cannot controul our judgment. Such a decision there undoubtedly is (*a*), from which an inference has been drawn, and not improperly, as regards that case, that trespass will lie against commissioners of bankrupt; and we have brought our consideration to the subject again and again, and I have anxiously adverted to the high authority of that case, which is the only one directly in point. In that case, it is clear that the warrant of commitment was bad upon the face of it, and therefore that the plaintiff was precluded from having his writ of error, and my Lord Chief Justice *De Grey*'s opinion might probably have been grounded upon that circumstance. That case was argued no less than three times, and

(*a*) *Miller* v. *Seare*, 2 Sir W. Bla. 1141.

1823.
DOSWELL
v.
IMPEY.

we may collect from the report that the reasons and observations of the Judges there, were rather general reasons and observations respecting the validity of the warrant, than any particular authority given to the commissioners touching the examination of bankrupts, or of persons connected with them, or conversant with their affairs. Indeed, the clause in the statute relating to this subject, does not seem to have been very distinctly quoted, nor the judgment of the Court to have been applied specifically to that point. That decision however, has been generally, though certainly not universally, considered as giving the rule of law upon this subject; but we think this question should rather be decided by looking to the object of the legislature, as collected from the import of the language of the statute 5 *Geo.* 2. c. 30. s. 15. One main object of the bankrupt laws undoubtedly is, to obtain a full disclosure of the property of the bankrupt, and therefore, a power is given in this section to examine persons suspected to be in possession of any effects belonging to the bankrupt. By the 34 & 35 *Hen.* 8. c. 5. and the 13 *Eliz.* c. 7. the commissioners may summon and examine all persons concealing or suspected of concealing a bankrupt's goods, debts, or effects, and the penalty for not disclosing and shewing the whole truth respecting such of the bankrupt's property as the party is examined to, is forfeiture of double the value of the goods. These provisions were evidently insufficient for the object in view, and accordingly the 10th section of the 1 *Jac.* 1. c. 15., reciting the former act of *Elizabeth*, in some respects considerably enlarges the powers of the commissioners, but no further power or authority appears to have been given them on the subject of examination, until the 5 *Geo.* 2. c. 30. which was made to remedy the abuses, and to supply the defects of the former acts. It contains many provisions on several matters not connected with the present question; but the 16th section, upon which the present question arises, was manifestly intended to give the commissioners a larger power than any

1823.

DOSWELL v. IMPEY.

former statutes had given them. It directs that the examination may be as well by word of mouth as by interrogatories in writing; that not only the bankrupt himself, but every other person who is duly summoned and present, may be examined, touching and relating to the trade, dealings, and estate of the bankrupt, or as to any act or acts of bankruptcy committed by him; and that in case any such person or persons shall refuse to answer, or shall not fully answer to the satisfaction of the commissioners, it shall be lawful for them to commit, &c. The words are "to the satisfaction of the commissioners;" it is not, till they can give satisfactory answers to the commissioners, or satisfactory answers generally, but till they shall give answers that are satisfactory to the commissioners; so that by the very words of this clause, the commissioners are authorized to commit the party who shall not fully answer to their satisfaction. We would ask if there is any man, whose mind is not previously occupied by legal definitions and nice distinctions between what is judicial and what is ministerial, in Courts of Record and Courts not of Record, who would entertain a doubt of the meaning of the legislature when this act was framed? We think all such distinctions are inapplicable to the present case. We are not aware of any authority given in any other statute which is expressed so clearly, and we think distinctions such as I have alluded to, ought not to prevail against the plain sense of the language of the statute. By the 1 *James* 1. the power to commit was only in case the party should refuse to be sworn and examined, and by the provisions of that statute, it might be contended, that a person who made any answer, however inapplicable to the interrogatories put to him, could not be committed, and so the act made for the full discovery of the bankrupt's effects, would be rendered unavailing. A further act was therefore necessary to supply this defect, and this defect will be supplied by the construction which we give to this section of the 5 *Geo.* 2. If this be not the true construction, and if the statute does not give the commissioners authority to com-

1828.
Doswell
v.
Impey.

mit where the party examined answers unsatisfactorily, then the commissioners must be at the mercy of the examinant, and must be content with such answers as he may chuse to give. But this construction is the only one which gives effect to all the other clauses; for if this clause were to be interpreted that the party may be committed "if he should not fully answer," (stopping there) those words standing alone would lead to a multiplicity of actions, in which the question would always recur whether the answers given were full. This would lead to a variety of decisions; for one Court might think the party had fully answered, and another Court might be of a contrary opinion. Now it is a general and well understood rule in the construction of written documents, to give effect to every word and sentence, if it can be done without repugnance to any known law. By the 43d section of this statute, the commissioners are required to take an oath that they will execute the several powers and trusts reposed in them according to the best of their skill and knowledge, without favor or affection, prejudice or malice. If then, in the exercise of their best skill and knowledge they find the answers given to them are not satisfactory to their own minds and judgment, will they be acting impartially and faithfully in the discharge of their duty, if they forbear to commit the party? If they do commit, are they to be subjected to an action of trespass? We think the counsel for the plaintiff cannot contend for that. It will be observed, that we give our opinion only as to an action of trespass. If the commissioners abuse their authority, they may be punished by a criminal prosecution. Upon the remedy by an action on the case, we forbear to give any opinion, as that is not the question brought before us. There is also the writ of habeas corpus. Is the party to remain in prison if the commissioners are not satisfied with answers which it appears ought to have satisfied their minds? Certainly not. The law has provided a remedy by a writ of habeas corpus, by which the party may be brought before the Lord Chancellor at any time, or before any of the

judges of the other Courts, if it is during the vacation. This statute of the 5 *Geo.* 2. studiously provides, that no improper use shall be made of the powers it confers, by requiring in the 17th section that the commissioners shall specify the questions for the refusal to answer which, or for not fully answering which, the party shall be committed; and then by the 18th section, the Court or Judge, before whom any person is brought by habeas corpus, is required to recommit the party, "unless it shall be made appear to such Court or Judge by the party committed that he has fully answered all lawful questions put to him by the said commissioners." Here the requisition is "the fully answering all lawful questions;" not "the answering to the satisfaction of the commissioners." Taking the three sections together, we think the result of the whole is, that the commissioners are first to decide for themselves, and for this purpose *are* judges executing their office under the sanction of an oath. If in their judgment the party does not answer fully, or to their satisfaction, they may commit; specifying in the warrant of commitment what the questions and answers were. But so far as the liberty of the subject is concerned, the party committed may go before a superior Judge to have the decision of the commissioners reviewed, and for this purpose the whole of the examination is to be set forth in the warrant; and if the Judge shall be of opinion that the answers were satisfactory, the party is to be discharged; if otherwise, he is to be remanded back into custody. Our judgment is founded upon the words of the statute, as we understand and as we can best expound them; and we think that the construction now put upon them is the one best calculated to prevent the various frauds and concealments of property in cases of bankruptcy, which have been so justly complained of in modern times. The judgment of the Court therefore on the demurrer must be for the defendants.

Judgment for the defendants on demurrer.

1823.

Saturday, Feb. 1.

THOMSON *v.* AUSTEN.

On non assumpsit pleaded, and notice of set-off given to an action for goods sold and delivered, a witness was called to prove a conversation with plaintiff, in which the latter began by proposing to refer the matters in dispute between him and defendant to the arbitration of witness; but this being refused, plaintiff proceeded to admit that he had received on account of defendant 800*l.*, a sum more than covering the demand in the action:— Held, that this conversation was receivable in evidence under the notice of set-off, and ought not to be rejected as an offer of compromise, although plaintiff expressly requested the witness to state the conversation to defendant, to induce him to come to a compromise.

ASSUMPSIT for goods sold and delivered. Plea, Non Assumpsit, with notice of set-off. At the trial before *Burrough*, J., at the last *Lent* Assizes for the county of *Cornwall*, the plaintiff having proved a primâ facie case of demand upon the defendant for goods sold him to the amount of 630*l.*, a clerk of the defendant's attorney was called, for the purpose of shewing, that in an interview between the clerk and the plaintiff, the latter had said "he was so anxious to get out of law that he would refer the question in dispute to the witness, as an arbitrator;" and upon that being declined, added, "he had received 800*l.* from Mr. *Campbell*, on Mr. *Austen*'s (the defendant's) account, which he meant to set-off against some bad debts owing to him from some other persons." But as the witness admitted that he was desired to communicate to the defendant what the plaintiff had said on this occasion, for the purpose of inducing the former to agree to a compromise, it was objected on the part of the plaintiff that the evidence could not be received, because it was in the nature of a confidential communication, made with a view to a compromise, and was therefore protected by the general rules of evidence; and the learned Judge yielding to the objection, the evidence was rejected, and the plaintiff had a verdict.

Adam, in *Easter* Term last, having obtained a rule to shew cause why the verdict should not be set aside and a new trial granted, on the ground that the evidence had been improperly rejected,

Wilde now shewed cause against the rule. The real question in this case is a mere question of fact, namely, whe-

ther the communication made by the plaintiff to the defendant's attorney did or did not amount to a proposition for a compromise of the points in dispute between the parties; because, if it did so, or if it was an admission made for the purpose of purchasing peace, and with a view to a treaty for the settlement of the action, it is quite clear upon decided cases, that it was not receivable in evidence. *Slack* v. *Buchanan* (a), *Waldridge* v. *Kennison* (b), *Turton* v. *Benson* (c), and *Gregory* v. *Howard* (d). In order to judge of the intention of the party in speaking as he did, the whole of his communication must be reviewed. He begins by expressly offering to refer the whole matter in dispute to the witness, and so far his intention to compromise cannot be doubted. He says, "I am so anxious to get out of law, that I will refer the case to you." That offer is indeed rejected; but in what follows his inclination for a compromise is equally apparent; for he directly authorizes the witness to make known to the defendant all he has said; and with what possible view could he so authorize him, but that of inducing the defendant to accept some terms of settlement without going into Court? Upon a fair interpretation of words, as indicative of an intention to act in a particular way, and upon all the probabilities of the case, it is clear that the plaintiff's object in making this admission was, if possible, to effect a compromise; and consequently upon the authority of the cases cited, that communication was to be protected, and was not admissible in evidence. It may further be observed, that the exclusion of this evidence cannot work any prejudice to the defendant, because if the money alluded to was really received by the plaintiff on account of the defendant, the latter has another remedy by a cross action against the former. Upon this view of the circumstances this rule must be discharged.

(a) Peake's N. P. C. 5.
(b) 1 Esp. N. P. C. 143.
(c) 1 P. Wms. 497. Vide *Harman* v. *Vanhatton*, 2 Vern. 717.
(d) 3 Esp. N. P. C. 113.

Adam and *Carter*, contrà.—It is no answer to the present application to say, that the defendant has another remedy for the injury of which he complains, because if the learned Judge who rejected this evidence was mistaken in the course he took, the defendant is entitled to the remedy which he now seeks at the hands of the Court, by enabling him at a new trial to establish the set-off of which he gave notice at the former trial, and which he was then prevented from proving by the rejection of the evidence in question. Even if it can be considered that the communication in this case was in the nature of an offer to compromise, still it seems very doubtful whether the cases which have been cited would govern the present; for they were decided upon circumstances of a much stronger nature than are to be found here; and at least in the present case the evidence rejected included facts which ought to have been presented to the consideration of the Jury, and in the absence of which they could not fully and impartially judge of the merits of the case. But allowing the law as laid down on the other side to be correct, how does the present case fall within its operation? What is the essential and distinguishing principle of an offer to compromise? It is that the party so offering shall actually concede something; that he shall be ready to make some sacrifice; that he shall propose to abate some part of what he considers his just claim for the purposes of peace and reconciliation. But what are the facts here? There is no concession made; no sacrifice submitted to; no abatement of claims proposed; the very utmost length the plaintiff goes is the making a proposal to adopt a private instead of a public tribunal, and to have his demand considered by an individual instead of a Jury. Upon these grounds it is clear that this evidence was improperly rejected, and therefore the defendant is entitled to have this rule made absolute.

Abbott, C. J.—Upon the best consideration I have

been able to give to this case, I am of opinion that the mode in which the learned Judge, who tried this cause, left the point at issue to the Jury, was not altogether correct; and therefore it is our duty to send it down for further inquiry before another Jury. It appears that the former part of the conversation to which the witness was a party, was received in evidence, and was so summed up to the Jury; and that the latter part, which has been the subject of argument to-day, was rejected. It is at all times a dangerous thing to admit a portion only of a conversation in evidence, because one part taken by itself may bear a very different construction, and have a very different tendency, to what would be produced if the whole were heard; for one part of a conversation will frequently serve to qualify and to explain the other. Upon this principle I think the exclusion of the evidence objected to at the trial was erroneous, and consequently the defendant should have another opportunity of submitting that evidence to the consideration of a Jury.

BAYLEY, J.—I am of the same opinion. It appears to me also, that the evidence rejected was not of that nature which would bring it within the rule on which the objection to it was founded. The conversation does not seem to me to have originated in any desire to compromise the dispute between the parties. The essence of an offer to compromise is, that the party making that offer is willing to submit to a sacrifice, and to make a concession; but I see no sign of any such inclination expressed by the plaintiff in the conversation in question.

HOLROYD, J., concurred (a).

Rule absolute.

(a) *Best*, J., was absent.

1823.



Tuesday, Feb. 4.

Burford v. Holloway.

In bail by affidavit, time will not be given to amend a mistake in the jurat, occasioned by the error of the commissioner in the country, unless the defendant produces an affidavit of merits.

Chitty moved in the Bail Court for time to amend the jurat in bail by affidavit, and the question was, whether it was necessary to produce an affidavit of merits to entitle him to the indulgence, it being suggested by the presiding Judge that an affidavit of merits was requisite. He urged, that this was not a case in which the Court had ever yet called upon a defendant to produce an affidavit of merits. This application to the indulgence of the Court became necessary, not in consequence of any fault of the defendant, but from a mistake on the part of the commissioner appointed to take affidavits in the country, in omitting to insert both names of the bail in the jurat, and therefore it would be extremely hard to make the defendant suffer for an error to which he was not privy.

Bayley, J. (the presiding Judge) said—That the Judges of this Court had, in consultation together, come to a determination not to grant time unless the party applying produced an affidavit of merits. He, therefore, desired it to be understood that time would not be given in future unless an affidavit of merits was produced. It might be true that the defendant was not personally privy to the mistake in the jurat, but it was the duty of the attorney in the country, to see that the bail were duly acknowledged. In all other cases where the party applied for indulgence of this nature, the Court always imposed the condition of producing an affidavit of merits as one of the terms upon which the indulgence was granted. Here the party sought indulgence, in consequence of an act of negligence which might easily have been avoided by proper care on the part of

1823.

BURFORD v. HOLLOWAY.

the attorney, and therefore the rule applicable to other cases where an affidavit of merits was required, must be extended to a case of this description.

Time refused.

BEST, J. laid down a similar rule on a former day in this Term, and suggested as the reason why the Court had come to this determination, that if the defendant had merits he might swear to them, and if he had none, he ought to pay the debt or go to prison, and take the benefit of the Insolvent Act, instead of squandering his money in law expences and absorbing those means which ought to be divided amongst his creditors (a).

(a) The only inconvenience resulting from this wholesome rule is, that when the defendant is not prepared to justify, or his time for justifying is out, he must now be rendered and bailed out again, under a fresh notice of justification.

PITTAM v. FOSTER, NORRIS, and MARY his Wife.

Wednesday, Feb. 5.

Assumpsit upon a joint promissory note made by *A.* and *B.* whilst *B.* was sole, against *A. B.* and *C.* the husband of the latter who was joined for conformity. Plea, actio non accrevit infra sex annos. Replication, that the cause of action arose within six years, and issue thereon;—held, that an acknowledgment by *A.*, within six years, that the debt was due, would not take the case out of the statute of Limitations, *B.* and *C.* being married at the time the acknowledgment was made.

ASSUMPSIT upon a joint promissory note for 69*l.*, made by *Benjamin Foster* and *Mary Norris*, before her inter-marriage with the defendant *Norris*, who was joined for conformity. Breach, first, non-payment by *Foster* and *Mary Norris* whilst the latter was sole; and, second, by all the defendants since the marriage of Mr. and Mrs. *Norris*. Plea, first, non assumpsit by *Foster* and *Mary Norris*; second, non assumpsit infra sex annos by the same defen-

1823.

PITTAM
v.
FOSTER.

dants; and, third, actio non accrevit infra sex annos, by all the defendants. On these pleas issue was joined. At the trial before *Holroyd*, J. at the last assizes for *Northamptonshire*, it appeared in evidence, that the note in question, which was dated 20th *September*, 1814, was given jointly by *Foster* and Mrs. *Norris*, his sister, whilst the latter was sole, to plaintiff, for money lent. To take the case out of the statute of Limitations the plaintiff's attorney was examined, and he stated, that by the plaintiff's direction he called on the defendant *Foster*, before action brought, to demand payment of the principal, and interest due upon the note. This was six years after the marriage of Mr. and Mrs. *Norris*. When he saw *Foster*, the latter said he should have nothing to do with the note; that his sister had all the property of their father, and that the plaintiff might look to her for payment. It was contended at the trial on the part of the defendants, that this was not sufficient evidence to take the case out of the statute, but the learned Judge said, if the Jury were satisfied that what *Foster* had said, was an acknowledgment that the money was not paid, in his opinion it would be sufficient to take the case out of the statute, and the law would imply a promise, which would be binding upon all the defendants and entitle the plaintiff to a verdict. It was then objected, that, supposing the acknowledgment of *Foster* would take the case out of the statute, with respect to him, still that would not bind the defendants *Norris* and his wife; for admitting that the acknowledgment of one joint contractor would be the acknowledgment of both in law, still after the marriage of Mrs. *Norris*, her acknowledgment so implied, would not bind her husband, and as there were no counts in the declaration, laying promises by the defendants after the inter-marriage of *Norris* and his wife, the acknowledgment by *Foster* would not support the action upon these pleadings. The learned Judge said he would save this point with liberty to the

defendants to move to enter a nonsuit or obtain a new trial, and the plaintiff had a verdict.

G. Marriott accordingly moved in *Michaelmas* Term for, and obtained a rule nisi to enter a nonsuit or for a new trial, upon this objection.

Reader and *Adams* now shewed cause against the rule. The declaration in this case is certainly founded upon a promise made by *Foster* and Mrs. *Norris*, whilst the latter was sole, and there are no counts upon promises subsequent to the marriage, but if the plaintiff is not to be tied down to the strict language of the declaration, the objection taken to the plaintiff's right of recovering is not available. Admitting that there is no count in the declaration laying a promise subsequent to the marriage, and that the declaration goes upon a promise prior to the marriage, still the latter must be considered as an immaterial allegation. The action is against two makers of a joint promissory note, and the husband of one is only joined for conformity. It is a clear rule of law that the admission of one of several makers of a promissory note would be good against all, and therefore the acknowledgment of *Foster*, within six years, that the note was not paid, would be an implied acknowledgment by Mrs. *Norris*, supposing she remained single. The allegation upon the face of the declaration, that the promise was made by Mrs. *Norris* whilst sole is quite immaterial, and may be treated as surplusage, because it cannot be disputed that the admission of *Foster* of his liability would take the case out of the statute as against her, as the comaker of the note, and of course against any other person interested through her. This case is perfectly distinguishable from *Sarell* v. *Wine*(a), which was an action brought by an administrator upon a promise made after the death of the intestate, and there the Court held, that though the

(a) 3 East, 409.

1823.

PITTAM v. FOSTER.

promise was made within six years after the death of the intestate, it would not support the action. But here all the parties are in existence; there the promise was after the party was dead. The fact of the marriage of one of the defendants does not alter the legal relation of the parties. An admission which would affect Mrs. *Norris* whilst single would affect her husband after the marriage, because he marries her with all her liabilities. Undoubtedly this is an entirely new case; but still it is to be classed under that head of cases where it has been held, that if there is an admission by one joint contractor, it binds both; and the only difficulty is, whether if one of two joint makers of a promissory note marries, and the other makes a promise, the effect of that promise shall be defeated by the fact of marriage. To hold that an acknowledgment by the husband is also necessary, would be going a great length, and would be contrary to the justice of the case. The case of *Whitcomb* v. *Whiting* (a) is an authority for shewing that the acknowledgment of one of several drawers of a joint and several promissory note, takes the case out of the statute of Limitations as against the others, and may be given in evidence in a several action against any of the others. Now the only circumstance which distinguishes this case from that, is, that a marriage has taken place between one of the makers of the note and a third person. But for the marriage the wife would be made liable by the admission of her co-contractor, but there seems to be no good reason why she should not be still affected by such an admission; and if she would be affected, her husband through her must likewise be affected, because he takes her to wife with all her liabilities. One of those liabilities is the circumstance of her being the joint maker of this note. She, it cannot be doubted, would be bound if she had not been married; neither can it be doubted, that if she survived her husband, and the note remained still unpaid, her liability would continue,

(a) Doug. 651.

1823.

PITTAM
v.
FOSTER.

even supposing her coverture suspended her liability in the interim. What then is there in this case to prevent the other two defendants being affected by the acknowledgment of the defendant *Foster*? The marriage of one of the makers of the note cannot suspend the right of action against her, nor discharge her husband's liability, because he is quasi one of the makers of the note. He is joined in the action simply for conformity, and therefore this case, in point of sense and law is not at all different from the ordinary case, where a husband becomes liable for a debt contracted by the wife dum sola. This case is not to be governed by the technical rules of pleading; the question being, whether this allegation as to the circumstances under which the promise was made is not immaterial, and may not be treated as surplusage. If, indeed, the promise was alleged to have been made by the husband, it might be open to objection, but being stated to be a promise made by *Foster* as one of the joint makers of the note with *Norris's* wife, the case does not come within the rule which exempts a husband from the operation of a promise made by a wife after marriage.

G. Marriott contrà, in support of the rule. The defendants have no interest in disputing the general proposition, that an acknowledgment by one joint contractor will take the case out of the statute of Limitations, in an action against two or more joint contractors. But that doctrine must be taken with this limitation, namely, that the implied promise which the admission of one joint contractor raises against another, can only avail where the other party against whom the implied promise is to have effect, is capable of making an express promise. If the party is incapable of making an express promise, he or she must be held incapable of being bound by an implied one, and à fortiori, of binding another. Applying this rule to the present case

1823.
Pittam
v.
Foster.

it cannot be doubted that Mrs. *Norris* could not bind her husband, by an express promise on her part, and consequently she could not bind him by an implied promise. It follows then from the form of these pleadings, and more particularly with reference to the replication, which takes issue upon a promise made by the wife within six years, and there being no counts upon promises made after the marriage, that this action cannot be supported.

The Court, upon this stopped him.

Abbott, C. J.—I am of opinion that this action cannot be supported. The declaration is upon a promise alleged to have been made by *Foster* and *Mary Norris* before her intermarriage. We cannot consider that as an immaterial allegation, in the way in which it has been considered in argument, because it is clear that a promise made by *Mary Norris,* express or implied, would not, after marriage, be sufficient to sustain this action. The question is, whether a promise made within six years, is to be considered with reference to the time when the cause of action originally accrued, as a substantive promise in itself, or whether it draws to its own date the promise originally made. If the promise made within six years will draw down to its own date the original date, the argument for the plaintiff would be right, but if not it will be wrong. In cases in which it has been attempted to apply the statute of Limitations to an action of trespass, by proving an acknowledgment within the period of time limited, several cases have occurred, in which Lord *Ellenborough* has recognized a distinction between the case of assumpsit and trespass. In the one, the acknowledgment of the debt is evidence of a fresh promise, but in the other, as no injury had been done to the plaintiff after the time for bringing the action had elapsed, the two cases were mainly distinguishable. Now, if the subsequent promise will refer back and draw to its own date the antecedent promise, then,

suppose an action brought by an executor or administrator, declaring upon a promise made to the intestate, or to the testator, proof of a promise made to the executor himself, would, upon that supposition, sustain the allegation in the declaration founded upon a promise made to the testator or intestate, yet the contrary has been decided several times. This was expressly decided in *Green* v. *Crane* (a). That case has been followed up by several other cases, and one of the latest is that of *Ward* v. *Hughes*. But there are other cases which it is not necessary to allude to. These authorities are sufficient to satisfy my mind, that the allegation of a promise made before the marriage is material in the present case, and that the promise after the marriage will not sustain the declaration. There may be great difficulty where there are several joint makers of a promissory note, in taking the case out of the statute of Limitations, where one of the makers happens to be married at the time the first promise is made, but I cannot, on account of such difficulty, break in upon a principle of law which has been long established; because it must be remembered that wherever a difficulty of this nature does occur, it must be considered as arising from the fault of the creditor in not taking steps to prevent the operation of the statute of Limitations.

BAYLEY, J.—The statute of Limitations is a statute of repose, and not to be defeated in its operation by slight evidence. This declaration is framed upon a promise made before the marriage of one of the defendants. The plea is, that the cause of action did not accrue within six years, the cause of action being the promise made before the marriage. The plaintiff replies that the cause of action did accrue within six years. It is a clear rule of pleading that the replication must support and fortify the declaration. Now,

(a) 2 Ld. Raym. 1101. 6 Mod. 309. 1 Salk. 28.

1823.

PITTAM v. FOSTER.

does the replication support the promise alleged in the declaration? The declaration alleges a promise made before the marriage; then does evidence of a promise made after the marriage support an allegation of promise made before marriage? I apprehend it clearly does not, and therefore cadit quæstio. All the authorities applicable to the present case are in point. In addition to those which have already been alluded to, there is a case which was decided in this Court, in *Trinity*, 1818, of *Manton* v. *Sculthorpe*, which was an action brought by an executor upon a promise made to the testator, to which the plea was, actio non accrevit infra sex annos, to which there was a replication, that the cause of action did accrue within six years, and proof was given of an acknowledgment to the executor. It was contended, that as the acknowledgment was evidence that the debt remained unpaid, it would be sufficient to sustain the allegation of a promise made to the testator, but the Court said it was no such thing, because the promise proved was out of the issue, which was upon a promise made to the testator. So, in this case the evidence relied upon is out of the issue. The promise which the plaintiff gave in evidence, was an acknowledgment by one of the joint makers of the note after the other was married. Though that might support a cause of action upon a new promise, yet it was not admissible in evidence on this issue. It was on that ground the Court decided in favour of the defendant in the case I have mentioned, and on the same ground I think we are bound to decide in favour of the defendant in this case.

HOLROYD, J.—I am of opinion that the case is not taken out of the statute of Limitations, inasmuch as the evidence of the fresh promise, was not within the terms of the issue. The issue is not upon a promise made by the three defendants, but upon one made by two of them. The promise alleged in the declaration is by *Foster* and the wife

of the other defendant dum sola. Therefore proof of an acknowledgment by *Foster*, one of the joint contractors after the marriage, will not support a promise alleged to have been made by the wife before marriage. The promise given in evidence is very different from that declared upon. There can be no doubt that the promise of a fême covert cannot bind her husband after the statute of Limitations has run, if made after the marriage. Certainly, a promise made by the wife dum sola, would survive after the death of her husband. Whether an actual promise made by the husband in a case of this description would or would not be binding, it is unnecessary to decide, because there are no counts in the declaration upon a promise made after the marriage. The action, upon a promise made by the wife dum sola, is brought against the husband, only because the law assumes it to be his promise. The sole issue in this case is, whether a cause of action has accrued within six years. It was proved that this woman had been married above six years, and therefore the acknowledgment by *Foster* afterwards, assuming it to be binding as an implied promise on the joint contractor, could not be considered as a promise by the wife dum sola within six years, for she had been married for six years; and even if she had not, still I think this action could not be supported, there being no counts upon promises after the marriage. I think the case of *Green* v. *Crane* is decisive of the present question. I know there have been some cases in which it is said, where something has been done to take the case out of the statute of Limitations, the party is bound to declare upon the subsequent promise, as for instance, in the case of a conditional promise, where the action is brought as if it was an original promise. In cases of this description, a fresh promise in law might arise, when the condition has been performed, because, until the condition has been performed, the promise is not considered absolute. How far cases of that description would be applicable to the con-

1823.
PITTAM
v.
FOSTER.

sideration of this case, so as to bind all these parties, it is unnecessary to determine, because the record must have been differently framed; but I doubt very much whether it could be framed in any way so as to meet the difficulties which this case presents; but the issue here is, whether, with reference to the cause of action stated in the declaration, there was a promise within six years. There being no promise within six years to support the cause of action so stated, I think the plaintiff cannot recover.

BEST, J.—At the time when the case of *Whitcomb* v. *Whiting* (a) was decided, the Courts of *Westminster* Hall were in the habit of putting a more liberal interpretation upon the statute of Limitations than in more modern times; for, at that period many circumstances were held to be sufficient to take a case out of the statute, which would not now be allowed. It was the opinion of the Court then, that a promise made by one joint maker of a promissory note would be the promise of both. If the promise made by one is to set up the original promise of the other, and that doctrine is to be taken strictly in modern times, the case which is to be brought within it, must, I apprehend, be clearly and distinctly made out. In principle it does seem hard to make the promise of one, the promise of two, after the statute of Limitations has run. However, it is not for me to give any express opinion on the present occasion to impugn the authority of that decision. The doctrine there laid down, has, however, received some limitation in the case of *Morris* v. *Norfolk* (b), because there it was held, that to support the cause of action after the statute has run, the promise must be by both. Now, here there is no cause of action proved within six years, because the implied promise by the wife was not until after the marriage, but we cannot give effect to such a promise because the law will not allow

(a) Doug. 651. (b) 1 Taunt. 212.

her to bind her husband. This is a further limitation upon the doctrine established in the case in *Douglas*, and takes it out of the rule there laid down. And I think we ought in this case, to put a further limitation upon it by holding that this action is not maintainable.

1823.

PITTAM v. FOSTER.

Rule absolute for a nonsuit.

DOE, on the several Demises of DAVID JONES, Gent., and of DAVID JONES, Gent. and JANE his Wife, in Right of the said JANE, and DAVID JONES, Labourer, *v.* HUGH JONES, Gent.

Friday, Feb. 7.

Discontinuance can only be created by a person who is tenant in tail in possession, at the time he does the act to defeat the settlement; therefore, where a marriage settlement conveyed an estate to trustees in trust for the joint lives of *A* and his wife, and the life of the survivor; remainder to the use of the trustees and their heirs, for the joint lives of *A.* and his wife, and the life of the survivor, to preserve contingent remainders; remainder to the use of one of the trustees, his executors and administrators, for five hundred years, to raise a sum of money for the younger children of the marriage, by sale or mortgage of the estate; remainder to the use of the heirs of the body of *A.*, begotten on the body of his wife; and remainder to the use of *A.*, his heirs and assigns for ever; and *A.*, during the continuance of his life estate, granted a lease of the estate for three lives, with livery of seisin to *B.*—Held, that this did not work a discontinuance of the settlement in tail, the intermediate estate to the trustees being vested.

EJECTMENT for the moiety of certain lands, tenements, and premises, called *Ddoynant*, in the parish of *Pencarreg*, in the county of *Caermarthen*. The first count stated a demise by *David Jones*, gent; the second, by *David Jones*, gent. and *Jane*, his wife; and the third, by *David Jones*, labourer. Plea, Not Guilty, and issue thereon. At the trial before *Bayley*, J., at the last *Lent* Assizes for the county of *Hereford*, the case, on the part of the lessor of the plaintiff, was this:—By marriage settlement of *Thomas Evan* and *Martha John*, bearing date 6th *February*, 1777, *Evan Samuel*, and *Catherine* his wife, by lease and release, granted the entirety of the estate in question to *William David*, and *Evan William*, to hold to them, and the survivor, and his heirs, to the use of the grantors for their

1823.

DOE
v.
JONES.

lives; remainder to the use of the said *Thomas Evan* and *Martha John*, for their joint lives, and the life of the survivor; remainder to the use of the said *William David* and his heirs, for the joint lives of the said *Thomas Evan* and *Martha John*, and the survivor to preserve contingent remainders; remainder to the use of the said *William David*, his executors and administrators, for five hundred years; remainder to the use of the heirs of the body of the said *Thomas Evan*, on the body of the said *Martha*, his intended wife, to be begotten; remainder to the use of the said *Thomas Evan*, his heirs and assigns, for ever. The term of five hundred years created by this settlement was declared to be for raising, by sale or mortgage, 40*l.* for the younger child or children of the marriage. *Evan Samuel* died in 1777, and *Catherine*, his wife, in 1786. *Martha* the wife of *Thomas Evan* died before *May*, 1811, having had by her said husband *Thomas Evan* only two children, namely, *Jane*, who married the lessor of the plaintiff *David Jones*, and *Margaret*, who married the defendant *Hugh Jones*. *Thomas Evan* died in *March*, 1817; his daughter *Jane* survived him, and is still living; his daughter *Margaret* died before him, leaving two children by her said husband the defendant *Hugh Jones*. *David Jones*, labourer, was the administrator de bonis non and personal representative of *William David*, the trustee, for the term of 500 years. To this case the answer, on the part of the defendant, in the first instance, was, that he was entitled to the possession of the premises by virtue of a lease granted to him by *Thomas Evan*, as tenant in tail, pursuant to the statute 32 *Hen.* 8. c. 28; and a lease was proved, dated 6th *May*, 1811. To this lease two objections were taken on the part of the lessor of the plaintiff, first, that the lands demised had not (within the words of the statute) been "most commonly let to farm or occupied by the farmers thereof for the space of twenty years next before the lease made;" and, secondly, that the

rent was not (within the words of the statute) reserved "to the lessor and his heirs to whom the reversion should appertain," the rent reserved being made subject to a deduction of 2*l.* 10*s.* a year by way of annuity in fee to the wife of the said defendant *Hugh Jones*, according to the provisions of a former deed of 2d *June*, 1800. The learned Judge held the last objection to be valid. It was then contended on behalf of the defendant, that although the lease were void as not having been made conformably to the statute, yet as livery of seisin was given upon it, such lease with the livery of seisin, operated as a discontinuance, and that the lessor of the plaintiff could not therefore recover in ejectment, but must have recourse to a proceeding by formedon. The learned Judge inclined to think that it was a discontinuance; and therefore directed a nonsuit, with liberty to move to set it aside and enter a verdict for the lessor of the plaintiff.

Russell (with whom was *M'Mahon*), in *Easter* Term last moved accordingly, and contended, that there was no discontinuance, inasmuch as *Thomas Evan* was not such a tenant in tail as could make a discontinuance, he not being seised of an estate tail in possession, but in remainder only, in consequence of the interposed estate of *William David*, the trustee, to preserve contingent remainders. He stated it as an established principle, that no person can create a discontinuance who is not in the actual possession of the estate tail by force of the intail, and that a person seised of an estate tail only in remainder, cannot make a discontinuance. *Peck* v. *Channell*(a), *Driver*, dem. *Burton* v. *Hussey and others* (b), *Cruise*, Fines, 333. And it is clear that the estate to a trustee to preserve contingent remainders is a vested estate, and must have the same effect as if it were limited to any person not as a trustee; for courts of law cannot take notice of trusts charged upon legal estates.

(a) Cro. Eliz. 827, 828. (b) 1 H. Bl. 269.

Coulson v. *Coulson* (*a*), *Hodgson and Wife* v. *Ambrose* (*b*), and *Measure* v. *Gee* (*c*). Upon the authority of these cases the Court granted a rule nisi.

W. E. Taunton, Sir *William Owen*, Bart., and *R. V. Richards*, now shewed cause against the rule. Ejectment cannot be maintained in this case; and if the lessor of the plaintiff has any remedy, it is in formedon. The lease for three lives granted by *Thomas Evan*, with livery of seisin to the defendant, is a discontinuance of the estate tail, and will operate to destroy not only any right of entry which the remainder-men might have, but also to discontinue the term of 500 years, as well as to defeat the entry of the heir. Supposing the lease, with livery of seisin, does not afford sufficient ground for presuming that the term of 500 years has been surrendered or satisfied, still if the lease be a discontinuance at all, it will have the effect above-mentioned. In point of law, perhaps, the estate tail in remainder would not vest until after the end of the term, so as to give the legal seisin to *Thomas Evan*; but the argument for the defendant is, that the life estate to *Thomas Evan* is merged in the subsequent limitation to the heirs of the body. Independently of the objection arising from the circumstance that the surrender of the term must be presumed, this difficulty will occur in holding that the estate limited to the trustees for preserving contingent remainders, is to take effect as a vested estate, namely, that *William David*, to whom this term is limited, happens, by a strange blunder, to be one of the very trustees to preserve contingent remainders. So that if the trustees for preserving contingent remainders take, in this case, a vested estate in remainder, *William David*, being one of those trustees, will be incapable of taking the term limited to him, and the fee-simple also, inasmuch as the fee-simple and the term can-

(*a*) 2 Stra. 1165. S. C. 2 Atk. 246.
(*b*) Doug. 330.
(*c*) 5 Barn. & Ald. 910.

not unite in the same person at one and the same time. It is not necessary that a person should be seised as tenant in tail at the time the discontinuance is created; it is sufficient that he be tenant in tail. *Co. Lit.* 339 a. sec. 637. The lease for three lives with livery of seisin in this case operates as a discontinuance, so long at least as the lives are in existence; and if it be a discontinuance at all, it applies as well to the term as to the other incidents of the settlement. The case of *Colson* v. *Colson* certainly seems to be an authority against the defendant; but in more instances than one Lord *Hardwicke* was dissatisfied with the certificate sent by this Court in that case into *Chancery* (*a*). In support of the present case, *Hooker* v. *Hooker* (*b*) seems an authority; for there it was held, that where a remainder in tail or fee, comes to, or descends on tenant for life, either by his own act, or the operation of law, the two estates are so consolidated, that it should seem the intermediate contingent estates are destroyed; or if they do open on the contingencies happening, they are suspended until that time. [*Abbott*, C. J. In that case there was no intermediate vested remainder interposing to prevent the union; but here there are trustees to preserve contingent remainders, and, if it is imagined that *Hooker* v. *Hooker* is an authority to govern the present case, it will remove altogether the necessity which conveyancers have felt of interposing trustees to preserve contingent remainders.] It may be a matter of doubt whether such a limitation to trustees to preserve contingent remainders, as is found in this case, is any thing more itself than a contingent remainder; because the event upon which it is to take effect may never happen. The estate is limited in the first instance to *Thomas Evan* and *Martha* his wife, for their joint lives and the life of the survivor; then there is a remainder limited to *William David*; but for what purpose? Why, to preserve contingent re-

(*a*) See the note to the report of *Colson* v. *Colson*, 2 Atk. 261.
(*b*) Cas. Temp. Hardw. 13.

1823.

DOE v. JONES.

mainders; but for what time? Why, for and during the lives of the former tenants for life. Putting the case simply, it is this: here is an estate for life to *A.*, with remainder to *B.*, for and during the life of *A.* That would convey no interest whatever to *B.*, because he is not to take until *A.* is dead, and then he will take nothing; consequently the limitation to preserve contingent remainders may never take effect, unless the tenant for life does some act by which he works a forfeiture, or his estate be otherwise determined in his own life-time. What then is there to prevent the two interests in this case, tenancy for life and tenancy in tail, uniting together, according to the rule in *Shelley's* case (*a*)? The interposition of trustees here does not prevent the union of interests. For this *Hooker* v. *Hooker* (*b*) is an authority, and therefore, first, according to the rule in *Shelley's* case, these two estates may unite together by reason of the trusts limited to *William David* not being vested interests, but contingent, upon the determination of the estate for life, which merges in the subsequent limitation to the heirs of the body; and, second, the lease for lives, with livery of seisin, operates as a discontinuance, producing all the consequences flowing from such an operation. They cited *Hodgson* v. *Ambrose* (*c*), *Co. Lit.* 333 a., and *Brown's* case (*d*).

Russell, contrà, was stopt by the Court.

ABBOTT, C. J.—I am of opinion that the rule in this case must be made absolute. The question is, whether the lease for three lives, granted to the defendant, with livery of seisin, works what the law calls a discontinuance, the grantor being at the time tenant for life with remainder to himself in tail. Two points have been made in argument, both of which I think are decided by the cases cited when

(*a*) 1 Rep. 93.

(*b*) Cas. Temp. Hardw. 13. See Vent. 306. and Sir T. Jones, 76, 77.

(*c*) Doug. 337.

(*d*) 3 Rep. 51.

the rule nisi was granted; first, that *Thomas Evan*'s estate for life merged by reason of the subsequent limitation to the heirs of his body; and, second, that the lease for lives, with livery of seisin, works a discontinuance notwithstanding the intermediate devise to trustees to preserve contingent remainders. Upon the first question, I think the case of *Colson* v. *Colson* (*a*) is directly in point, and is not distinguishable from the present. There an estate for life was given to *Robert Colson*, with a devise to *Isabell* his daughter, and to *Ralph Robinson* and their heirs, for and during the life of *Robert Colson*, and the certificate sent by the Judges of this Court was to the following effect:—"We are of opinion, that by reason of the remainder interposing between the devise to *Robert* for life, and the subsequent limitation to the heirs of his body, the said *Robert* took an estate for life, not merged by the devise to the heirs of his body, but by that devise an estate tail in remainder vested in the said *Robert*." That is precisely this case. It is said that Lord *Hardwicke* was not satisfied with the certificate given in *Colson* v. *Colson*; but that case is quoted in Mr. *Fearne*'s Essay on Contingent Remainders, as giving the rule upon such questions. The rule collected from that case is, that a person to whom an estate for life is expressly limited, with remainder to trustees to preserve contingent remainders, and remainder to the heirs of the body of the person taking the estate for life, takes an estate tail in remainder, and his estate for life does not merge in the subsequent limitation to the heirs of his body. The later authority upon this subject is *Measure* v. *Gee* (*b*), which I think is equally decisive. In that case a testator devised certain estates to his daughter for life, and after her decease to her son *John Tatam*, an infant, for life, and after the determination of that estate by forfeiture or otherwise, to trustees, to preserve contingent remainders, but to permit *John Tatam* to receive the profits during his life, and after

(*a*) 2 Atk. 260. (*b*) 5 B. & A. 910.

1823.



DOE v. JONES.

the decease of *John Tatam*, to the heirs of his body for ever, with a devise over in case of the failure of his issue. The question for the opinion of the Court was, whether *John Tatam*, the son, took an estate tail in remainder in the estate and premises in question, under and by virtue of his grandfather's will; and the Court held, that he took an estate in remainder. Upon the authority of these cases, it is quite clear that *Thomas Evan* took an estate tail in remainder. Then the second question is, whether an estate tail in remainder can be discontinued before it vests. Upon this point the case of *Peck* v. *Channel* (a) is quite decisive; for there it is said, " that he who hath a remainder in tail, or a reversion in tail, expectant upon an estate for life, and levies a fine by himself, or joins with the tenant for life in the fine, this is not any discontinuance, but passeth only that which he might lawfully grant, and *none shall make a discontinuance but he who is seised of an estate tail* IN POSSESSION. *Lit.* 616. Therefore, if a conveyance had been executed, although the tenant for life was a different person from the tenant in remainder, yet the tenant for life could not have joined the remainder-man in the conveyance. These are authorities against both points, and consequently this rule must be made absolute.

BAYLEY, J.—I am of the same opinion. A discontinuance can only be created by a person who is tenant in tail in possession at the time when he does the act to defeat the settlement. Discontinuance of an estate tail has the effect of working the worst species of wrong that can be, because it destroys all remedy by entry, all right to mesne profits, and gives to the party aggrieved, whether issue in tail or remainder, a remedy by formedon only. We ought therefore to attend carefully to the authorities before we say that a particular act creates a discontinuance. Looking to all the authorities upon this subject, I believe it will be found that

(a) Cro. Eliz. 828.

1823.

DOE
v.
JONES.

no act will create a discontinuance, unless it be the act of tenant in tail in possession. Many authorities have decided, that if tenant in tail bargains to sell his estate to a man and his heirs, by which he creates a fee, and he afterwards levies a fine come ceo, &c., that creates no discontinuance. So if he levies a fine without proclamations, having granted away the estate tail before the fine is levied, which may be considered as a base fee, by a species of conveyance not now much in use, but not being in possession of the estate tail when the fine is levied, that does not make a discontinuance. I take the rule to be, that the party must be tenant in tail *in possession* at the time when the fine is levied. Now, was *Thomas Evan* tenant in tail in possession, at the time when he granted the lease to the defendant? It is argued that he was, because the first estate given to him being an estate for life, with remainder to the heirs of his body, both estates unite. They do unite to a certain extent, but only so as to make him tenant for life with a distant remainder to himself in tail; so that the issue would take not by purchase but by descent. Still, however, the intervention of the estate of the trustee would, according to all the authorities, be a vested interest, taking effect before the estate tail in remainder, and thereby preventing the union contended for. It is said to be doubtful whether the limitation to the trustee, to preserve contingent remainders, is, under the circumstances of this case, any thing more than a contingent remainder. This, I believe, is the first time it was ever argued that a limitation to trustees to preserve contingent remainders, was itself a contingent remainder. It does not follow that because the remainder is not in possession, it is therefore contingent, for it may still be a vested remainder, and so the authorities are. But I think *Colson* v. *Colson* is decisive of the question, whether the life estate here merges in the estate tail. There is, however, another authority for shewing, that if tenant for

1823.

DOE v. JONES.

life, with remainder in tail, joins in levying a fine, that will not work a discontinuance; *Bredon's* case (a). In that case there was a fine levied by tenant for life, with remainder in tail, but the Court held that no discontinuance was worked. If, indeed, the fine had been levied by tenant in tail in possession, it would have created a discontinuance; but what does the Court say in that case? The fine levied by tenant for life with remainder in tail, works no discontinuance, because there, the freehold passes from tenant for life only, and the remainder passes from the remainder-man in tail, by way of grant; and therefore livery of seisin is considered as the act of the tenant for life, and tenant for life only. So here, *Thomas Evan* who grants livery of seisin is only tenant for life, so far as the livery is concerned, and the remainder, if he levied a fine, would only pass by way of grant. For these reasons, I am of opinion that a lease for lives, with livery of seisin, granted by a person who is tenant for life, with remainder in tail, not in possession, does not work a discontinuance so as to destroy the right of entry, and defeat ejectment.

HOLROYD, J.—I am of opinion that the case of *Peck* v. *Channell* goes directly to shew, that in order to create a discontinuance, the act which is to have that effect must be done by tenant in tail in possession. It has been argued in the present case that at the time when the act was done, which, it is insisted, has the effect of working a discontinuance, the party, by reason of the unity of the life estate, and the tenancy in tail in remainder, must be considered as tenant in tail in possession. The case of *Colson* v. *Colson*, appears to me to decide the very contrary. It is a clear rule of law, with respect to conveyances as well as wills, that if an estate for life is given to an ancestor, and by the same instrument an estate is given to the heirs of his body, so as to give a descendible estate, the heirs do not take an

(a) 1 Rep. 76.

estate themselves, but the instrument operates by way of limitation, and the estate goes first to the ancestor, as an estate tail in him, instead of an estate limited by purchase to the issue. In the case, where an estate for life is given to a man, and in the same conveyance, after other contingent estates, an estate is given to his issue; until the contingencies have happened, there is no intermediate estate between, for they have no existence, and there is no possibility of their having existence until they have become vested interests; and therefore, in the case where estates are to depend upon contingencies, and thereby become what are correctly called contingent estates, until those estates arise, there is nothing between the estate for life and the limitation to the heirs of the body, to prevent a complete coalescence, and make at once an estate tail instead of an estate for life, with remainder in tail. But here there is an intermediate particular vested estate in trustees, to preserve contingent remainders; and therefore, in this case the general rule of law to which I have adverted, does not apply so as to convert the estate for life in the ancestor into an immediate estate tail, but it operates in this way:—He takes the estate for life with specific remainders, which are vested by the settlement in trustees, with remainder to himself in tail, instead of an estate by purchase to the issue. That being the case, the lease for lives granted by *Thomas Evan*, who was tenant for life only in possession, does not work a discontinuance so as to defeat the intermediate vested estates in remainder. As far as the subsequent remainders are concerned, his act, supposing he had given livery of seisin in fee, would only operate to destroy his own life estate, but all the estates in remainder in succession, would be let in one after the other. This act cannot prejudice the rights of the intermediate takers. It appears to me, therefore, that to enable the party to create a discontinuance, he must be tenant in tail in possession. *Thomas Evan* did not answer that description; he was merely tenant for life with an ultimate remainder, after

intermediate remainders which were vested, and consequently his lease for lives with livery of seisin, did not work a discontinuance.

BEST, J.—The doctrine of discontinuance is entitled to no encouragement, inasmuch as it drives parties to the more circuitous process by formedon to assert their rights, instead of ejectment. The cases which have been referred to by my Lord Chief Justice, are quite decisive of this question. I cannot comprehend how an estate can be discontinued which never begun. Here the estate tail in remainder had *never* taken effect. The cases which have been cited in argument for the defendant, are cases where the estate for life and the estate tail might have been united, because there was no intermediate estate between them to prevent the union ; but here there is an intermediate estate, which absolutely prevents the coalition. In *Colson* v. *Colson*, the interposition of an intermediate estate, shews that it was the intention of the testator that the life estate, and the estate in remainder in tail should not unite. That case is precisely in point with the present. The case of *Measure* v. *Gee* shews, that in consequence of the intermediate estate to trustees to preserve contingent remainders, the estate to *John Tatam* was not a vested estate, but an estate tail in remainder; and the case of *Peck* v. *Channel*, is decisive to shew that any act done by the tenant in tail, not in *possession*, though he joins with the tenant for life, will not create a discontinuance. Here there is an intermediate estate, which prevented the tenant for life from being seised as tenant in tail in remainder in possession, and consequently the two estates could not unite to effect a discontinuance.

Rule absolute.

JOHNSON *v.* LINSEY.

Friday, Feb. 7.

Principal became bankrupt, and on the same day that he obtained his certificate, but before the rising of the Court, the bail were fixed on scire facias:—Held, that the bail had, till the rising of the Court on that day, before they could be fixed, and on payment of costs, the Court entered an exoneretur on the bail piece.

ON shewing cause against a rule for entering an exoneretur on the bail piece, the question was, whether by the practice of the Court, if the bail are not absolutely fixed before the allowance of the Chancellor's certificate to their principal, who had become bankrupt pending the action, they might not apply to the Court to have an exoneretur entered on the bail piece, on the ground that if they had surrendered their principal, they would have been discharged. The bail had been fixed on scire facias on the same day that the bankrupt had obtained his certificate, but before the rising of the Court; and the point was, whether they had not till the rising of the Court on that day before they could be fixed; and

The Court being referred to *Woolley* v. *Cobbe* (*a*), and *Cock* v. *Brockhurst* (*b*), were of opinion that the bail were entitled to relief, on payment of costs, and therefore made the

Rule absolute, for entering an exoneretur on the bail piece.

Wightman for the plaintiff, and *Marryat* for the plaintiff.

(*a*) 1 Burr. 244. (*b*) 13 East, 588.

1823.

Friday,
Feb. 7.

PICKERING *v.* NOYES.

The Court will not compel a party to allow the inspection of his title deeds, and give a copy thereof to a person who supposes that such deeds contain a reservation in his favour of manorial rights, unless it appears that the party holds the deeds as trustee for the applicant.

E. LAWES, on a former day, obtained a rule, calling upon *William Iremonger*, Esq. to shew cause why he should not allow *James Widmore*, Esq. to take a copy of a certain deed of conveyance in his possession, dated 17th *February*, 1736, for the purpose of enabling the defendant to plead to an action of trespass. The affidavit in support of the motion, stated, that this was an action of trespass for breaking and entering several closes, parcel of a farm called *Torton*, in the possession of the plaintiff, in the county of *Southampton*, and for hunting for game in those closes, and with dogs treading down the herbage, and breaking the hedges and fences; that the defence in this action mainly depended upon a conveyance supposed to be dated the 17th *February*, 1736, and made between one *Richard Widmore*, one Sir *Francis Child*, and *William Gindott*, and *Alice Gindott*, whereby the said *Richard Widmore* conveyed to Sir *Francis Child* the farm called *Torton* farm; that *William Iremonger*, Esq. claimed to be entitled to the said farm of which the plaintiff was tenant to him, and that the defendant was the reputed game-keeper of the said *James Widmore*, who claimed under the said *Richard Widmore*, party to the deed in question; that search had been made in the chest of Mr. *Widmore*, for an original part of the deed, but without effect, from which circumstance it was believed that only one part of the conveyance was executed between all the parties, or, at all events, that the said *Richard Widmore*, and those claiming under him, never had any original part of the said conveyance delivered to him or them, but that the said *William Iremonger* had an original part of the said conveyance in his possession, of which it was necessary the

1823.

PICKERING *v.* NOYES.

defendant should have an inspection and perfect copy before he pleaded to this action, inasmuch as it was supposed that the said conveyance contained a reservation to *Richard Widmore*, under whom Mr. *James Widmore* claimed title, of all manorial rights. The affidavit further stated, that Mr. *Widmore* was in possession of an imperfect copy of the deed, which was insufficient to enable the defendant to plead. Under these circumstances, it was contended, that the defendant was entitled to the benefit of the rule.

Adam now appeared to shew cause, but he was stopped by the Court, who desired to know upon what authority one man should be at liberty to look into the title deeds of another.

E. Lawes, in support of the rule, insisted, that this was a case in which the Court would interfere on behalf of the person under whom the defendant in this action proposed to justify the alleged trespass. The deed in question was supposed to contain a reservation to Mr. *Widmore*'s ancestor of all royalties and manorial rights. The defendant's plea depended upon the terms of this conveyance, and unless the Court allowed an inspection, and a correct copy of it, he would be unable to avail himself of a valid defence. It was believed that only one part of the conveyance had been executed between all the parties, and therefore the person who had the possession of it must be considered as holding it as a trustee for all other parties interested, in which case the authorities were strong in favor of this application. He cited *Gracewood* v. —— (*a*), *Blakley* v. *Porter* (*b*), *Cooke* v. *Tanswell* (*c*), *Morrow* v. *Sanders* (*d*), *King* v. *King* (*e*),

(*a*) Barnes, 439.
(*b*) 1 Taunt. 386.
(*c*) 1 J. B. Moore, 465.
(*d*) 1 Brod. & Bing. 318. S. C. 3 J. B. Moore, 671.
(*e*) 4 Taunt. 666.

1823.
PICKERING v. NOYES.

Taylor v. *Osborn*, cited in *Bateman* v. *Phillips* (*a*), *Street* v. *Brown* (*b*), and *White* v. *Earl of Montgomery* (*c*).

ABBOTT, C. J.—The Courts have, as it seems to me, gone to the utmost length they ought to go, in ordering persons to produce their title deeds. None of the cases which have been cited warrant this application, and I should be sorry if any case could be found in which this Court, or any Court of law, had taken upon itself to order a person to produce his title deeds of so early a date as 1736. I should have been much concerned to find such a case reported, and I do not think such a case ever existed. Courts of law have never been in the habit of allowing the inspection of title deeds, unless where the party who has the possession of the deeds, holds them as a trustee for others. In such cases an inspection has been allowed, but under no other circumstances.

The rest of the Court concurred, and the

Rule was discharged, with Costs.

The defendant's time for pleading being out, the Court, on the prayer of *Lawes*, allowed him ten days further time to plead.

(*a*) 4 Taunt. 157.

(*b*) 1 Marsh. 610. S. C. 6 Taunt. 302.

(*c*) 2 Stra. 1198.

1823.

RICKARDS v. BENNETT and Another.

Friday, Feb. 7.

To support a claim of toll traverse, a special consideration need not be shewn. Where to trespass for distraining goods brought to the market of F. for tolls due in respect thereof, the defendant justified the distress by shewing a prescriptive right as lord of the manor of F. of which the town of F. formed a part, to take a certain reasonable toll for goods brought within the town for the purpose of being there delivered, and in fact delivered, and averred certain special considerations for taking the toll, to which the plaintiff was no party:— Held, after verdict, that the prescriptive right of soil in the manor, (the toll being coeval therewith) was a sufficient general consideration for the toll, as a toll traverse, the plaintiff having brought and delivered goods within the manor.

TRESPASS for taking certain cheese and corn of the plaintiff. The defendants pleaded, first, the general issue, Not Guilty, and then several special pleas, justifying the alleged trespass, in respect of the defendant *Bennett's* right of toll for certain goods brought to *Farringdon* market for sale. These pleas stated in substance, that this defendant at the time of the alleged trespass was seised in fee of the manor of *Great Farringdon*, in the county of *Berks*, whereof the town of *Farringdon* from time immemorial was a part, and which town was from time immemorial divided into two townships; that he had immemorially repaired and maintained, and still ought of right to repair and maintain, at his own proper costs and charges a certain market-house, a certain lock-up-house, a certain pound, two pair of stocks, one half of a bridge over the river *Thames*, and the stalls and stallage of the market-place of *Farringdon*, and also to provide a certain brass bushel measure, for the use and benefit of all persons resorting to the said town of *Farringdon*, and that from time immemorial he was entitled to receive for every ton of hard cheese, and for every quarter of corn brought into the said town for sale, and there sold and delivered within the town, or brought for the purpose of being delivered, and delivered within the town, a certain reasonable toll or duty of sixpence for each and every ton of such cheese, and one penny for each and every quarter of such corn, and so in proportion for smaller quantities, the same being payable and to be paid by the seller of such cheese and corn after the arrival thereof within the said town of *Farringdon*, and when the same is ready to

1823.
RICKARDS v. BENNETT.

be delivered, but before the actual delivery thereof to the purchaser. The defendant then claimed a right to distrain upon the goods so brought to market for the tolls payable in respect thereof, after demand and refusal, and then averred that the plaintiff had brought within the town of *Farringdon* certain quantities of cheese and corn, in respect of which certain tolls or duties, after the rate set out, became and were payable, and so justified the alleged trespass as a distress for the said toll, after demand of and refusal to pay the same. Issue upon the pleas. At the trial before *Garrow*, B., at the *Berks* Lent Assizes 1822, the case was left to the Jury upon the merits, and the defendants had a verdict.

Jervis, in *Easter* Term last, obtained a rule nisi to arrest the judgment, upon the ground that the pleas set forth no consideration for the toll, sufficient in itself, or extending to the plaintiff, and founded his motion upon the authority of the case of *Trueman* v. *Walgham* (a).

W. E. Taunton, *Shepherd*, and *R. B. Comyn*, now shewed cause. The objection raised is to the form of the pleas, which it is said are insufficient to support the justification, because the consideration for the toll there set out does not extend to the plaintiff. This rule was granted upon the authority of *Trueman* v. *Walgham*; but that case is very distinguishable from the present. That was a prescription for a toll through a highway; the defendant pleaded that he was seised of the town, and that he was liable to repair the streets; but as it did not appear that he was liable to repair the particular street along which the plaintiff was passing when the seizure was made, the consideration was held insufficient. But here the prescription is for a toll upon goods brought within the manor, and there are many cases precisely similar to the present, which shew, that for such

(a) 2 Wils. 296.

1823.

RICKARDS v. BENNETT.

a prescription the general consideration here set out is quite sufficient. *Dyer*, 352. *Warrington* v. *Mosely* (a), *Ward* v. *Knight* (b), *Crisp* v. *Bellwood* (c), *James* v. *Johnson* (d), *Smith* v. *Shepheard* (e); and *Colton* v. *Smith* (f). From these authorities it may be collected, that to sustain a toll traverse the mere entry of the goods into the manor, no matter by what means, or on what part of it, is sufficient, and that any easement afforded to the public by the person seised of the manor is a good consideration. In such a case it is not requisite to shew that the plaintiff had actually taken the benefit of the consideration, it is enough that he might have done so if he chose. Upon the facts stated in these pleas, the Court will presume that the grant of the toll was from time immemorial. If the consideration be in fact insufficient, it was the duty of the plaintiff to have replied to the pleas, but having joined issue upon them, and that issue being found against him, he is not entitled to make such an objection as this. As a toll traverse the consideration stated here, is clearly sufficient, but the argument may be carried yet further; for, under the circumstances of this case, it was not necessary to state any consideration at all. Possession of the manor from time immemorial, and the mere act of landing the goods within it, are of themselves a complete answer to this action, because where there is ground for supposing that a prescription might have a lawful beginning, it is well enough without shewing it. *Smith* v. *Shepheard* (g). Upon these grounds it is clear that the present rule must be discharged.

Jervis and *G. Cross*, in support of the rule. In order to justify a trespass in claiming toll, it must appear what the toll is, and there is no evidence to that effect in the present case. The case of *Trueman* v. *Walgham* is precisely

(a) 4 Mod. 319.
(b) Cro. Eliz. 227.
(c) 3 Lev. 421.
(d) 1 Mod. 231.
(e) Cro. Eliz. 710.
(f) Cowp. 47.
(g) Cro. Eliz. 710.

1823.

RICKARDS v. BENNETT.

in point with the present, and the observations made upon the plea there will apply strictly to the present defendants' pleas, namely, that the two species of toll are artfully confounded together. Not one of all the considerations stated in these various pleas is applicable to the plaintiff, nor is any one of them co-extensive with the claim set up. It is clear upon the evidence that the goods were seised upon the highway, but there is no proof that the highway was part of the manor, so that toll is claimed by the defendant in right of his manor, without proving that the goods ever were in fact upon the manor. Now that ought to have been distinctly shewn by the defendant; and the Court cannot presume it. If the toll is claimed in respect of the ownership of the soil, it must be shewn to have been coeval with the right of soil, and that very principle is recognized in Lord *Pelham* v. *Pickersgill* (a), and in the case of Lord *Pelham* v. *Haine*, there cited. But the short and conclusive argument here is this; there are only two species of toll known to the law, namely, toll thorough, and toll traverse; the toll claimed by the defendant must be of one or the other of these species; if this be a toll thorough, it is clear from all the authorities, that a full consideration extending to the plaintiff must appear; if it be a toll traverse it is equally clear that some consideration at least must exist. But upon the face of these pleadings the defendant is not brought within either of these rules; for what consideration is there to be found here either extending specially to the plaintiff, or applying generally to all mankind? It is stated indeed that the defendant is lord of the manor, but non sequitur that he is also owner of the soil; and he must be both, in order to sustain this claim. This distinction is laid down in Lord *Pelham* v. *Haine*. The only strong authority cited on the other side is the case of *Crisp* v. *Bellwood*, and that seems to have been somewhat invalidated by the more recent case of *Colton* v. *Smith*. Upon the

(a) 1 T. R. 660.

1823.

RICKARDS v. BENNETT.

whole view of the case, this toll, if it be a toll at all, must be claimed as a toll traverse; and in order to support that claim there must be a dedication of the soil and freehold to the public, which has not been shewn here, nor indeed could be, because there is no averment that the defendant ever was owner of the soil. His mere right as lord of the manor is not ground enough to presume his ownership of the soil (a); and therefore the pleas in this case are insufficient, and the plaintiff is entitled to have the judgment arrested.

ABBOTT, C. J.—The point last suggested in argument does not arise in the present case. The plea alleges not only that the manor has existed time immemorial, but that from time immemorial the town has been parcel of the manor, and it seems to me we must intend, that, from time immemorial, the person who was seised of the manor was seised of the town also. Then, if the payment is alleged to have been made time immemorial, are we not thence to infer that the owner of the manor, who has erected the market-house, and taken upon himself the burthen of maintaining the buildings and other conveniences mentioned in the plea, has set out sufficient consideration for the toll received from all persons bringing their commodities into the town, and delivering them upon that which is his soil, and of which he has the inheritance? It seems to me that we must so understand it, and that in so doing we are warranted by the authority of *Colton* v. *Smith*, and *Crisp* v. *Bellwood*, which I think shew that this is a sufficient consideration for the toll. The present case in point of form is free from the objection which prevailed in *Trueman* v. *Walgham*, because here, although the plea alleges divers special matters, it has not in point of form tied down the consideration to those matters, to which it is said the plaintiff is an entire stranger. But he is not an entire

(a) Com. Dig. tit. Toll. Roll. Abr. Id.

1823.

RICKARDS v. BENNETT.

stranger to the consideration stated here, because he has the benefit of the erections which are mentioned in the pleas, and of placing his commodities in the town. It seems to me, therefore, that putting the case upon that ground, there is a sufficient consideration stated to render the plaintiff liable to the toll.

BAYLEY, J.—I think this is good as a toll traverse. The pleas allege certain special considerations, to which undoubtedly the plaintiff is a stranger, and unless they can be supported by something independent of those considerations, they present no answer to the action. But I think there is sufficient consideration stated in these pleas independently of the special matters. It is stated that the defendant is lord of the manor, which must of course have existed before time of legal memory; that the town from time immemorial has been and still is part and parcel of the manor; that the lord of the manor from time whereof the memory of man is not to the contrary, has been entitled (not by reason of the special grounds stated in the previous part of the pleas, but generally) to receive the toll in question for certain goods brought into the said town for sale; and a general obligation is averred imposing upon the plaintiff the liability to pay that toll. Then it is in respect of certain goods brought into the manor by the plaintiff, that he is made chargeable to the toll, and I think that as originally and before the time of legal memory the soil of the whole of the manor was in the lord, we are at liberty to infer that this toll was created by the lord at the period when the soil both of the town and of the manor was vested in him. We cannot arrest the judgment in this case upon a speculation that it is possible this might not under some circumstances have been a good prescription. The plaintiff is to shew that it must have been by law a bad prescription in its origin; and if it be possible that it might have had a good legal origin, so as to have existed immemorially, we

are bound to conclude that it in fact had such origin. This might have had a legal origin; for at the time when the toll was created the soil and freehold of the whole manor, and of the whole town, were in the lord. On these grounds it appears to me, that this case ranges exactly within the cases mentioned by my Lord Chief Justice. In Lord *Pelham* v. *Pickersgill* the tolls could not be supported, and never could have been legally demanded, unless the highway had been shewn to be an immemorial highway, and unless the receipt of the toll had been established at the period when the highway was dedicated to the public. It seems to me, that we should not be warranted in arresting the judgment on these pleas; for as the Jury have found that the prescription had existed in point of fact, we are not at liberty to say that it is not good in point of law.

HOLROYD, J.—I am of opinion that the prescription as pleaded is good in point of law. This is an objection on the record; the Jury have found the prescription existing in fact; and if the consideration, or that which the law requires to be stated in the plea, was not stated sufficiently, certainly the plaintiff would be entitled to judgment non obstante veredicto. If the claim was in respect of goods brought through the manor as a highway, this case would range itself within the principle applicable to cases of toll thorough. This, however, is not a claim for passing through the manor, but a claim for toll by prescription, for bringing goods into the manor, delivering them there, or depositing them for that purpose, or for sale. The prescription pleaded in this case appears to me to be established not only by those cases already mentioned by the Court, but also by that of *James* v. *Johnson*, in all of which the toll was claimed, not for passing the highway, but for coming into the manor, and where the consideration was not co-extensive with the claim. In one of those cases the claim was in respect of repairing a wharf, and it was held, that the bring-

1823.

RICKARDS v. BENNETT.

ing the goods within the manor, although the wharf was not used, was sufficient to support the claim. This case is mainly distinguishable from those where toll has been claimed by prescription for passing along the highway, and where it has been held that a special consideration must be stated. The king's subjects have a common law right to pass along every highway, which is in itself a right existing previous to all prescriptions, and therefore in order to establish a toll in such cases, the consideration must be shewn to be co-extensive with the claim. There is a case of *The Mayor of Nottingham* v. *Lambert* (a), which has not been adverted to. In that case there was a claim by the corporation of *Nottingham* to take toll for passing the ancient navigable river *Trent*, and it was held that the prescription for the toll could not be supported in law, because no consideration for it was shewn. That decision was founded upon the very principle to which I have just alluded in the case of a highway; namely, that the river *Trent* having been immemorially a navigable river, every subject had a common law right to navigate it at his pleasure, unless some consideration was shewn for the toll. But in that very case *Willes*, C. J. in delivering a very elaborate judgment, admits the propriety of those decisions which have been referred to by my learned Brothers, and expressly declares, that in a toll traverse the consideration may be implied. Upon this principle I am of opinion, that the prescription here pleaded is sufficient, without shewing any more special consideration. It does not appear whether this was part of the highway, or not; but whether the consideration should have been stated as for a toll thorough, or not, it seems to me that the liberty of landing goods within the manor is a sufficient consideration for the toll, although the particular place where they were landed, may have been a highway. On these grounds I think this rule must be discharged.

(a) Willes, 111.

BEST, J.—I am of opinion that these pleas are good after verdict. I agree that the prescription must have a good beginning to support it in point of law, and it appears to me that this prescription must be held to have had a good beginning, not as for a toll thorough, but as for a toll traverse. The distinction between the two is, that in the former there must be a special consideration shewn to impose the obligation of paying the toll, but in the latter, the consideration may be presumed. The special matter set out in these pleas does not in my opinion shew a sufficient consideration for a toll thorough, because there is no averment that the plaintiff received any benefit from it; but what is said in the cases of *Colton* v. *Smith,* and *Crisp* v. *Bellwood,* authorises us in holding, that although the matters specially stated would not be sufficient to support the pleas as for a toll thorough, yet that they are enough to support them for a toll traverse. The party claiming the toll here, is not merely the lord of the manor, but may, in my opinion, fairly be presumed to be also owner of the soil, and the ownership of the soil is sufficient consideration for the toll traverse. Indeed, correctly speaking, it is not necessary to set out any consideration, because the consideration is implied from the use of the soil. In the case of Lord *Pelham* v. *Pickersgill,* it was only stated, that the person who claimed the toll had the manor, but it did not appear, nor could it be presumed, that he was owner of the soil; and in the case of *The Mayor of Nottingham* v. *Lambert, Willes,* C. J., in giving judgment, decides that case upon that very distinction; because he says, it does not appear that the plaintiffs are owners of the soil, and therefore the case is very different from that where the party claiming the toll has the right to the manor and to the soil. He considers the right to the manor not to be sufficient as a consideration for toll traverse, unless there is also the right to the soil, where the claim is made. In this case if it is shewn that the defendant is owner of the manor, a foundation is laid for presum-

1823.

RICKARDS v. BENNETT.

ing that he also owns the soil, and I think there is sufficient to raise that presumption; and if so, the use of the soil by the plaintiff would be a good consideration, upon the principle I have stated, to support the defendant's claim. I am of opinion that we may reject from the pleas all that is necessary to shew that this was a toll thorough, if there remains enough to shew that it is good as a toll traverse. The consideration here is the use of the soil, which may fairly be presumed to belong to the lord of the manor, and I think that is sufficient to support the prescription as stated on these pleadings.

Rule discharged.

Saturday, Feb. 8.

DOE, on the Demise of HENRY WICKHAM v. JONATHAN TURNER.

Testator, after devising to his nephew *H. W.* a messuage, forming part of his real estate, devised as follows:— "Item, I give further unto my nephew *H. W.* half-part of my garden, and 100*l.* stock in the 4 per cent. Bank Annuities. *I give further my yard, stable, cow-house, and all other out-houses in the said yard, to my sister* MARTHA WICKHAM, *to have the interest and profits during her natural life*:"—Held, by three Judges (*Best*, J. dissenting), that under this bequest *H. W.*, after the death of *Martha Wickham*, took an estate in fee in the yard, &c. to the exclusion of the testator's heir-at-law.

EJECTMENT to recover the possession of a yard, stable, cow-house, and other out-houses, situate in the county of *Essex*. At the trial before *Park*, J., at the last *Essex* Assizes, it appeared that the lessor of the plaintiff claimed the property in question as devisee under the will of one *David Turner*, deceased, against the defendant, as devisee under the will of his father *Jonathan Turner*, heir-at-law of *David Turner*, and the question between the parties turned upon the construction to be given to certain parts of the will of *David Turner*. The will was dated 19th *April*, 1806, and was duly executed to pass real estates. It contained a great variety of bequests, but those upon which the question arose were these:—"I give unto *Henry Wickham* a messuage or tenement, now in the possession of *Wakeling*. Item, I give further unto my nephew *Henry Wickham* half-part of my garden, and 100*l.* stock in the

1823.

DOE v. TURNER.

4 per cent. Bank Annuities; *I give further my yard, stables, cow-house, and all other out-houses in the said yard, my sister* Martha Wickham, *to have the interest and profits during her natural life.*" The testator died soon after the execution of this will, leaving his eldest brother and heir-at-law *Jonathan Turner*, the father of the defendant, his sole executor, who delivered to *Henry Wickham* the possession of the messuage and half-part of the garden, and 100*l.* stock. The testator's sister *Martha Wickham* received the rents of the " yard, stables," &c. up to the time of her death, after which *Jonathan Turner* entered into possession thereof, as heir-at-law, and enjoyed the same up to the time of his death in 1813, having previously made his will, by which he gave them to his son (the defendant), who continued in the receipt of the rents thereof at the time when this action was brought, and the question was, whether, under the words of the will, the yard, stables, &c. passed to the lessor of the plaintiff *Henry Wickham*, as reversioner in fee, after the termination of the life estate of his mother *Martha Wickham*; or whether they reverted to the defendant as devisee of his father, the heir-at-law of the testator *David Turner*; and the learned Judge being of opinion that the latter was the true construction of the devise, directed the Jury to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit.

Nolan, in *Michaelmas* Term last, moved accordingly, and obtained a rule nisi, and

Marryat and *Chitty* now shewed cause, and contended, that the words of the will were sufficiently comprehensive to pass the fee to the lessor of the plaintiff. First, there is an express devise to him by name; then the testator proceeds, " I give further," &c. another express devise to him also by name; and then, " I give further," &c. the property in question, without mentioning any name, and concluding,

1823.
Doe
v.
Turner.

"my sister *M. W.* to have the rents, &c. for her life." Here then is a clear and manifest intention to give the fee simple of this property to *some* individual, though *none* is named, and it is equally evident that the sister is not the individual meant, because the bequest to her is in unequivocal terms for her life only. Then who could the individual intended be, but the lessor of the plaintiff, who is the object of the bequest immediately preceding, and who will as clearly appear the object of this bequest also by merely introducing the word "him" between the words "I give" and "further?" The fair and popular sense of the word "further" is strongly in favor of this construction; it is a word of addition, and goes to prove that the testator considered this as one continuous bequest to the lessor of the plaintiff, limiting, in the latter part, the rents of the estate to his mother for her life. This construction renders the whole passage consistent and intelligible, gives effect to the manifest intention of the testator, and removes all doubt and difficulty from the case; and therefore, upon this ground, the plaintiff is clearly entitled to a verdict.

Nolan and *Walford*, in support of the rule. The defendant, in this case, claims under the heir-at-law, and there is no legal principle more clearly established than this, that the heir shall not be disinherited upon conjecture, or by any thing short of clear and unequivocal words of devise. *Doe* v. *Wright*(a). In construing bequests of personal property, a liberal interpretation is often allowed; but in cases of real estate, a strict and literal explanation has always been deemed proper; and there can be no rule in such cases more dangerous or unjust, than construing one part of a devise by another. This testator was an illiterate and uneducated man, who had probably no very correct notion of the nice legal distinctions that may be taken between words of apparently synonimous import;

(a) 8 T. R. 64. 1 New Rep. 335. and 7 East, 259.

but, independently of that, the word "further" will by no means carry with it the meaning which is contended for on the other side. It does not mean "in addition to," with a retrospective view limited to the next preceding bequest; it is a synonyme for "also" or "item," and has reference to the whole will at large; and is therefore clearly descriptive of the commencement of a new and separate bequest. It is true that no individual is named as the object of that bequest; but what is the consequence of that omission? That the intention of the testator is rendered equivocal and doubtful, and therefore another rule of law is brought into operation; namely, that where the language of a will is doubtful, the presumption is in favor of the heir, as the favorite of the law, and that he is entitled to the property; *Right* v. *Compton* (a), where all the leading authorities upon this subject are fully considered, and which is directly in point with the present case. Upon two principles therefore the present action cannot be maintained; first, that this is a clear and unequivocal bequest to *Martha* of a life estate, without any remainder over, upon which view the fee simple unquestionably reverts to the heir; and, second, that the language of the will is at least so equivocal, that a strong doubt is raised as to the intention of the testator, and therefore the heir is entitled to the benefit of that doubt, to the exclusion of all other persons.

ABBOTT, C. J.—I am of opinion that we may give such a construction to the language of this will as will entitle the lessor of the plaintiff to recover possession of the property in question, without infringing either of the rules of law which have been alluded to in argument, and to which I am certainly inclined to pay the most implicit respect. But there is a third rule of law bearing upon this subject, which has not been attended to on the present occasion,

(a) 9 East, 267.

1823.
Doe v. Turner.

namely, that in deciding questions of this kind a will is to be taken altogether, or, as Lord *Kenyon* emphatically expresses it, "you are to look into all the four corners of the will;" and the sense in which particular words *are intended to be used* in one part may be discovered by seeing in what sense those words *actually are used* in other parts (a). Now, in applying this rule of construction to the present will, it will be found that the word "further" is never used in any prior part of it, but where there is a second bequest to a person previously named; and the fair inference consequently will be, that it was used with the same intention with reference to the lessor of the plaintiff. By acting upon this inference, and inserting the word "him" in the passage which we have to consider, full effect is given to the testator's apparent intention; without this assistance the clause becomes absolutely void, which it is our duty to prevent, if we can by any means discover a reasonable method of giving it validity and effect. Taking the whole of this will together, it seems to me the manifest intention of the testator was to give to his sister *Martha* the rents of the estate in question during her life, and the fee simple of it to her son the lessor of the plaintiff after her death; and, giving effect to that intention, as I think we are bound to do, I am clearly of opinion the lessor of the plaintiff is entitled to judgment.

Bayley, J.—We certainly are not empowered to make a will for a testator, but we are empowered, and it is our duty also, so to construe the will he has made, as to give effect to that which upon the whole may reasonably be taken to have been his intention and object. We are to act either upon express words, or upon a manifest intention, and where the language is at all doubtful in one part, we are to construe that part by reference to and comparison with former parts, as a key to explain the particular word which

(a) Vide *Strong* v. *Teatt*, 2 Burr. 910, and *Doe* v. *Laming*, Id. 1100.

gives rise to the doubt entertained. The devises in this will are very numerous and diversified; but the testator seems to have observed this rule, that where he is making a second bequest to a person already mentioned in the immediately preceding clause, he invariably makes use of the word "further;" but where he is making a bequest to a person for the first time, he recommences his will as it were de novo, and makes use of the word "item." From hence I draw this inference, that he perfectly well knew the distinction between these two words, and that he intended to use them in very distinct senses, and that the meaning he had in view to express, when using the former, was, "*in addition to* what I have already given to *Henry Wickham*, I give him my yard," &c. subject to a life estate to his mother. Looking at the will altogether, I have no doubt that the testator intended to give the fee simple of this property to *Henry Wickham* after the death of his mother, and that we should be acting in opposition to that intention, and against the force of the whole frame and tenor of the will, if we were to put any other construction upon this particular portion of it.

HOLROYD, J., concurred.

BEST, J.—I do not mean to go the length of declaring that my opinion is in direct opposition to that which has been expressed by the rest of the Court in this case, but I am sorry to be compelled to say, that, as at present advised, I cannot bring my mind to accede to the doctrines upon which the decision of to-day is founded. It is admitted, on all hands, that we cannot make a will for the testator, and that we cannot substantially add to the will that he has made for himself. I fully agree in this admission; it is in my opinion the only safe principle to go upon in the construction of any will. I fear that, under the idea of construing language, many wills have virtually been

1823.
DOE
v.
TURNER.

made, very foreign to the imagination and design of the authors; and I am not without my apprehensions that such will be the effect of the construction which has been put upon the instrument now before the Court, because, in order to effect that construction, words of very important force and meaning have been added to the instrument itself. I am not prepared to justify or defend the adoption of the phrase, that the heir is the favorite of the law; it is certainly an old expression, though it is perhaps an improper one, because justice is the only favorite that the law can or ought to have. But the phrase has a just and an important meaning, namely, that the title of the heir-at-law is a clear and unequivocal title, and is not to be defeated by any other title less clear, and it is certainly not a modern dictum "that the heir is favored by the common law." (*a*) Now in the present case, upon the face of this will, is there any other title to this property so clear and unequivocal as that of the heir-at-law? I confess I am at a loss to discover it. If a passage in a will be obscure, I agree with Lord *Kenyon*, that we are to go into all the four corners of it, to look for that which may elucidate its meaning; but then the object must be to find something which can render certain that which was previously uncertain; that "quod voluit non dixit;" and this at least is necessary here; for the testator certainly has not used words of gift, whatever his intention might be. If this particular clause is to be taken by itself as a single independent bequest, the fee simple is certainly not given to *Henry Wickham*, and I do not see in what other light it can properly be taken. There is no connection between this particular estate and those estates which form the subjects of the former bequests. It is clear, beyond all doubt, that in this bequest the life estate is given to *Martha Wickham*; but from whence are we enabled to trace a devise of any farther legal estate? This clause certainly includes none such, unless the word "further" can be so construed, which

(*a*) Vide 32 H. 8. c. 1. 2 Lill. 11. Noy, 185. Chanc. Rep. 7.

I am of opinion it cannot be. I take the fair, popular, and ordinary sense of that word to be "likewise," or "also," which would be clearly insufficient for the service into which it is sought to be pressed; and looking at its reference to other parts of the will, I cannot find that its meaning is at all enlarged; for I can find no one clause in which the language is precisely similar to that of the clause in question, although there are several that contain very different and much clearer and stronger expressions. At present, therefore, I cannot but consider it a highly dangerous doctrine to hold, that words so uncertain as these appear to me to be, shall have the effect of disinheriting the heir-at-law. Conjecture ought never to prevail against the heir, and I cannot see any thing stronger than conjecture in favor of the interpretation now given to these words; for there is no part of this will which at all indicates an intention on the part of the testator to cut off his heir-at-law. I refrain from giving any decided opinion for myself upon this particular case, and it is with much regret that I find myself obliged to dissent from that expressed by my learned Brothers; but thinking as I do, that, in the present decision, the rule of construction has been carried too far, I feel it my duty to lay before the Court my reasons for not giving to their decision that assent which it is so painful to me to withhold.

Rule discharged.

1823.

Saturday, Feb. 8.

An attorney, who, whilst he is a prisoner in gaol, sues out or commences any process in the County Court, is within the stat. 12 *Geo.* 2. c. 13. s. 9. and liable to be struck off the roll.

Ex parte ABRAHAM FLINT, Gent., one, &c.

THIS was a motion to strike an attorney off the roll of the Court for practising whilst he was a prisoner in *Derby* gaol, under sentence for a misdemeanor, contrary to the stat. 12 *Geo.* 2. c. 13. s. 9. It was alleged, that during the period of his confinement, he had levied a plaint in replevin, in the County Court, on the retainer of a client, the expence of which he had charged in his bill delivered, of fees and disbursements, the only proof of his having so practised being the bill in question. The question was, whether an attorney, who practices merely in the County Courts, is subjected to the operation of the ninth section of the statute above-mentioned, which enacts, "that no attorney or solicitor, who shall be a prisoner in any gaol or prison, or within the limits, rules, or liberties of any gaol or prison, shall, during his confinement, in his own name, or in the name of any other attorney or solicitor, sue out any writ or process, or commence or prosecute any action or suit in any Courts of Law or Equity, and that all proceedings in such action or suits shall be void and of none effect; and such attorney or solicitor so commencing or prosecuting any action or suit as aforesaid shall be struck off the roll, and incapacitated from acting as an attorney or solicitor for the future; and any attorney or solicitor permitting or empowering any such attorney or solicitor as aforesaid to commence or prosecute any action or suit in his name, shall be struck off the roll, and incapacitated from acting as an attorney or solicitor for the future."

The Court, after hearing the affidavits on both sides, touching the merits of the case, and considering the penal consequences of a decision against this party, suggested the expediency of an arrangement by which the Court should

not be called upon to pronounce an opinion upon this individual case, this being the first instance in which the Court had been called upon to consider a case arising upon this section of the statute. Accordingly the matter was so arranged privately, that the case was withdrawn from the consideration of the Court, but

ABBOTT, C. J., said—This individual case being now disposed of, the Court feels itself called upon to express a general opinion as to the construction of this act of parliament, without adverting to the particular circumstances of this case. We are all of opinion that an attorney, being a prisoner, who sues out or commences any process in the County Court, is within the operation of the act of parliament. We have no difficulty in declaring that to be our opinion; and we think it right to give this intimation upon the subject, that it may serve as a caution and warning to other persons hereafter.

Rule discharged (*a*).

Copley, S. G., and *Campbell*, were in support of the rule; and *W. E. Taunton* and *Russell*, against it.

(*a*) Vide *Cross* v. *Kaye*, 6 T. R. 663.

GOODRIGHT, on Demise of SADLER *v.* DRING.

Saturday, Feb. 8.

Certiorari lies to remove an ejectment cause from an inferior jurisdiction into this Court, and need not be removed by habeas corpus cum causâ.

MANNING last Term obtained a rule nisi for quashing a writ of certiorari to remove this cause from the city and county of *Norwich* into this Court, on the ground that a certiorari would not lie to remove an ejectment cause from an inferior jurisdiction, and that the proper course was to sue out a writ of habeas corpus cum causâ, for which he cited *Highmore* v. *Barlow* (*a*).

(*a*) Barnes, 421.

1823.
GOODRIGHT v. DRING.

Marryat now shewed cause against the rule, and contended that the proper course to remove the proceedings from an inferior Court was by certiorari, and not by habeas corpus, unless it was a cause where bail was required. All the authorities and books of practice, concurred in this with the exception of one case reported in *Barnes*, which he submitted ought not to govern the present. He cited *Cross* v. *Smith* (a) and *Taylor* v. *Shapland* (b). He also referred to 43 *Eliz.* c. 5. 21 *Jac.* c. 23. and contended that there was nothing to distinguish an ejectment from any other cause.

Manning, contrà, insisted that the certiorari would not lie. None of the cases referred to on the other side were actions of ejectment, in which the writ of habeas corpus was the only mode of proceeding; and he cited the case in *Barnes*, as directly deciding the point, and referred to *Gilbert's Ejectment*, 37. *Cro. Car.* 82. 8. 1 *Sid.* 231. *Bac. Ab. tit. Ejectment. Skin.* 244; in all which cases the practice by habeas was mentioned in terms, which marked it as the only course; but

Per Curiam.—We have heard nothing in argument to satisfy our minds that the writ of certiorari may not issue to remove the proceedings in an ejectment cause from an inferior Court into this. There seems to be no reason why this writ should not be as applicable to this form of action as to any other. The rule, therefore, for quashing the writ must be discharged. As the cause has been removed by the defendant if he shall not enable the plaintiff to proceed in the cause in the superior Court, that may be a good reason for granting a procedendo.

BAYLEY, J. said, It was more advantageous to the plaintiff that the cause should be removed by certiorari than by

(a) 1 Salk. 148. 2 Lord Raym. 836. and 345.
(b) 3 M. & S. 328.

habeas corpus, because the habeas corpus would only remove the plaint, whereas the certiorari would bring up all the proceedings from the inferior Court, and then the superior Court would be enabled to do that which might be done in the inferior Court. In *Tidd's Practice* it is laid down broadly that the writ of certiorari lies for the removal of all causes from inferior Courts, and makes no distinction between ejectments and other causes.

Rule discharged.

HODGKINSON and Another, Assignees of T. R. GREGG, a Bankrupt, *v.* TRAVERS and Another.

Saturday, Feb. 8.

A separate commission being sued out against *A.* and a joint commission being also sued out against him with *B.*; and the assignees under the first commission having recovered a verdict in trover against *C.* the Court allowed the amount of the verdict to be brought in to abide the event of a petition to the Chancellor to supersede the first commis-

THIS was an action of trover to recover certain goods and chattels, the property of the bankrupt, converted by the defendants, as judgment creditors of the bankrupt, after an act of bankruptcy had been committed. At the trial before *Abbott*, C. J. at the *London* Adjourned Sittings after last Term the plaintiff recovered a verdict, damages 1579*l.* On a former day a rule was obtained, calling on the plaintiffs and their attornies to shew cause why upon payment to the plaintiff's attornies of the costs of this action to be taxed by the Master, the defendants should not be at liberty to pay into Court the amount of the verdict in this cause, to abide the event of a petition now pending before the Lord Chancellor, for the purpose of superseding the commission against the bankrupt. It appeared from the affidavits, that on the 2d of *July* last, the defendants sued out a writ of fieri facias against the effects of the bankrupt, indorsed to levy 412*l.* 4*s.* 11*d.* under which the sheriffs of *London* levied to the amount of 1579*l.* On the 11th *July* a separate commission of bankrupt was sued out against *Gregg*, under which he was declared a bankrupt, and the plaintiffs chosen assignees. On the 26th of *August* following a joint com-

1823.
HODGKINSON v. TRAVERS.

mission of bankrupt was issued against *Gregg*, and one *William Phene*, under which they were declared bankrupts. Notice was given to the defendants by the solicitors under each of these commissions respectively, that they would be held liable for the effects seized in execution, and they were threatened with actions to recover the value of the effects seized. The plaintiffs, as assignees under the first commission proceeded in their action, and recovered a verdict as above-mentioned. On the 6th of *September* a petition was presented by a creditor of *Gregg* and *Phene*, praying that the separate commission against *Gregg* might be superseded, which petition had not yet been heard. The object of the present application was to pay the money recovered in this action into Court, to abide the event of that proceeding. Notice of the application had been given to the solicitors under the joint commission of bankruptcy.

After hearing *Scarlett* and *Marryat* for the plaintiffs, *Gurney* for the creditors under the joint commission, and *Gaselee* and *Chitty* for the defendants,

The Court said, this was a reasonable application, although it certainly had some novelty in it. If, however, by yielding to the application they should be disposed to intimate any doubt of the power of the Lord Chancellor over the subject in question, or of his willingness to do what was right and proper in the case, the Court certainly would not make the rule absolute. All that the Court could do was to take care that the money should be forthcoming, in order that it might be submitted to his Lordship's jurisdiction. By interposing in this way, and exercising the discretionary power of the Court, a great deal of expence would be saved to both parties. On this ground they thought the rule ought to be made absolute, the costs of this cause to be paid to the plaintiff's attornies. The money might either be paid into Court, or disposed of in any way satisfactory to the parties

1823.

HODGKINSON v. TRAVERS.

interested. It was quite clear that there could be no dividend paid under the separate commission until its validity had been adjudicated upon, by the Lord Chancellor.

It was then agreed that the money should be invested in Exchequer Bills in the names of the solicitors on both sides, the costs of the present cause to be paid to the plaintiff's attornies.

The rule was then made absolute with these modifications.

Ex parte MARINEL KRANS and Others.

Saturday, Feb. 8.

Where prisoners taken into custody after an engagement at sea between a revenue cutter and a vessel suspected to be a smuggler, of which the prisoners were the crew, were delivered on board a king's ship, and detained for fourteen days without any warrant, and were afterwards brought up by habeas corpus, to be discharged, and it appearing from the return that there was cause to suspect them of a felony, the Court refused a discharge, and directed them to be committed to the custody of the Marshal of the Marshalsea, in order that they might be taken before a competent tribunal to be dealt with according to law.

ON a former day in this Term, *Platt* obtained writs of habeas corpus, directed to the Commander of his Majesty's ship *Severn*, stationed in the *Downs*, to bring up the bodies of twenty-two persons, who had been confined, as was alleged, on board that vessel, from the 13th until the 27th *January*, (the day on which the writs issued) without any warrant for that purpose, in order that they might be discharged. At the same time a writ of certiorari issued, on the motion of the *Solicitor-General*, to the Coroner of the town and port of *Dover*, to return into this Court two inquisitions taken before him, one touching the death of *William Cullum*, a deputed mariner of his Majesty's revenue cutter the *Badger*, and the other, touching the death of three persons, unknown, together with the depositions taken under such inquisitions respectively. The bodies of the twenty-two persons abovementioned, were now brought into Court, and the returns to the writs of habeas corpus,

1823.

Ex parte KRANS.

and certiorari read. It appeared from the return to the writs of habeas corpus, that on the 13th of *January* the persons abovementioned were delivered on board the *Severn* in custody, charged with being concerned in an engagement at sea, on the same day, between his Majesty's revenue cutter *Badger*, and a certain smuggling vessel, which had been captured, and of which the prisoners were part of the crew, in which engagement *William Cullum*, a deputed mariner of the *Badger*, was killed, and that the prisoners had been detained until they could be conveniently brought to *London* to be dealt with according to law. From the return to the writ of certiorari it appeared that an inquisition was taken before the coroner for the town and port of *Dover* on the 16th of *January*, on the body of the said *William Cullum*, who had been killed by a gun-shot wound, in an engagement between the *Badger* and a smuggling cutter, after the crew of the cutter had cried "quarter," and that the inquest had returned a verdict of "wilful murder" against some person or persons to the jurors unknown; that on the same 16th of *January*, another inquest was held on the bodies of three men then lying dead in the town and port of *Dover*, and that the jury had returned thereon a verdict of—Justifiable Homicide. The depositions taken under this latter inquisition entered into a more detailed account of the affair between the *Badger* and the smuggling cutter above mentioned. In substance they stated, that early in the morning of the 13th of *January*, the *Badger* was cruizing in the *British Channel*, about three leagues from the *French* coast, when a strange vessel came in sight; that a signal was given to the latter to lay to, of which no notice was taken; whereupon the *Badger* discharged an unshotted gun with as little effect; that chase was then given for some time, when the *Badger* discharged a loaded gun; that then a general engagement ensued, with small arms and great guns on both sides, which, having continued a considerable, time, the crew of the strange vessel cried for "quarter," and

made signals to surrender. After the cry of "quarter," and whilst the *Badger* was grappling to take possession of the strange vessel, a fresh firing commenced on the part of the crew of the latter, by which *William Cullum*, one of the crew of the *Badger*, was killed. The strange vessel was then boarded, and it was found that two of her crew, consisting of twenty-five men, were lying dead on the deck, and a third, who afterwards died, severely wounded; whereupon the vessel was captured, and the surviving crew, consisting of twenty-two persons, taken into custody, and afterwards delivered on board the *Severn* on a charge of wilful murder. Upon searching the strange vessel she was found to be laden with half ankers of foreign spirits, tea, tobacco, and other contraband goods, and had on board a large supply of warlike weapons and ammunition. No colours had been hoisted by the alleged smuggler, but on board were found two *Dutch* flags. The language spoken by the crew was entirely *English*, and, at the time the vessel was first seen, she was sailing in a direction towards the coast of *Ireland*. Under these circumstances,

Brougham and *Platt* submitted that the prisoners must be discharged, and made three points, first, that the original detention was illegal, and not warranted by the circumstances disclosed on the returns to the writs; second, supposing the original detention not to be illegal, it had become so by the unreasonable confinement from the 13th to the 27th *January*, without any warrant or other legal process; and, third, that in the absence of any specific charge, the Court had no authority to deal farther with the prisoners, by changing their custody, and they must therefore be liberated. First, as to the return to the habeas corpus, it is obviously defective, and discloses nothing which can at all warrant the detention of the prisoners. It is true the return states the fact, that these men were delivered into the custody of the captain of the *Severn*, by the com-

1823.
Ex parte KRANS.

mander of the *Badger*, as persons who had been on board a vessel, captured by the *Badger*, but nothing is shewn to connect these men with the engagement stated to have taken place, and all that appears against them is the statement of information received from other persons. It is clear, therefore, that the return to the habeas corpus contains nothing to justify the farther detention of the prisoners. Then is there any thing upon the depositions which at all affects the prisoners, supposing them to have been engaged in the transaction in question? Certainly not. From the depositions returned, it appears that the king's vessel was the first aggressor, and the fatal consequences which ensued appear to have been justifiable upon the ground of self defence. Supposing this not to be so, still there is nothing to point out any of the individuals before the Court as participators in the affray. None of them are identified; and therefore from the very beginning their detention was illegal. But, second, supposing there might have been some colour for the detention originally, the confinement from the 13th to the 27th *January*, without any warrant or any steps taken to put their imputed conduct into a course of legal investigation, was illegal, and the Court is now bound to discharge them. Nothing disclosed on the return appears to justify this delay, before any legal and proper steps were taken. It is clear that the coroner might have issued his warrant for the detention of the prisoners, as soon as the inquest had returned the verdict on the body of *William Cullum*, if there had been any ground for imputing criminality to the prisoners. No such step having been taken, their detention for so long a period is clearly unlawful, and the Court has no alternative but to order their liberation. If the delay of a fortnight before any steps are taken to institute a legal investigation into the conduct of the prisoners could be justified, their detention for two or three years, or any length of time, might equally be justified upon the same principle. Supposing then their detention in the

first instance was excusable, the unreasonable length of time which afterwards elapsed before any proceedings were taken, renders their confinement altogether illegal, and they are entitled to be discharged from custody. Then, thirdly, admitting these objections to the original and continuing confinement to be not tenable, still, as there is here no specific charge on oath against the prisoners (whatever suspicions may be entertained of their conduct), the Court has no authority to remand them either to the same or to a new custody. If in this case there had been a commitment on a specific charge of felony, though the commitment was informal and irregular, still the Court, in the exercise of its discretion, would recommit the party, if upon the return there appeared to be a substantive charge to warrant their farther detention; but here no such facts are disclosed as will reasonably lead the Court to conclude that the prisoners are implicated in the transaction in question. This is not like the case of *Rex* v. *Marks* (a), which was a commitment under the unlawful oaths act, 37 *Geo.* 3. c. 123, where the Court, finding a specific charge against the prisoners contained in the depositions, remanded them, though the warrant of commitment was clearly defective. Here there is no commitment—no specific charge—no depositions pointing out the prisoners as implicated in any offence—and nothing whereon to found any farther proceedings against them in this Court, and therefore they are entitled to be discharged. The case of *The King* v. *Doctor Shebbeare* (b), is an authority to shew that a person brought up in custody, under a habeas corpus, shall not be recommitted to the same custody; but that case is distinguishable from this; for here there is no ground for committing these prisoners to a new custody, and there is no instance to be found in which this Court has ever acted as Justices of the Peace, by committing a person to a new custody, who has been brought up from an intermediate custody prior to any specific charge

(a) 3 East, 157. (b) 1 Burr. 460.

1823.

Ex parte KRANS.

before a magistrate upon oath. On these grounds the prisoners are entitled to be discharged.

Copley, S. G., contrà, was stopt by the Court.

ABBOTT, C. J.—I am of opinion that we ought not to discharge these persons on any of the grounds which have been suggested in argument. The only difficulty which the Court feels, is, as to the custody in which the prisoners shall now be placed. My opinion upon the case is founded entirely upon the matters stated upon the returns to the habeas corpus and the certiorari. Indeed, my opinion would be the same if founded upon the return to the habeas corpus only, because that document states the fact that these men were placed in the custody of the commander of the *Severn* upon a specific charge, namely, that of being concerned in an engagement between the *Badger* and a smuggling vessel, of which these persons were part of the crew, in which a person named *William Cullum*, a deputed mariner of the *Badger*, was killed, and that they were detained until they could be conveniently brought to *London*, to be dealt with according to law. I will only advert to the proceedings before the coroner, for the purpose of saying, that they afford strong confirmation of the fact stated in the return to the habeas corpus, namely, that the inquest have found that the person named *William Cullum*, in the return, had been murdered by some person or persons unknown. In justice to the prisoners, I forbear saying any thing more respecting these depositions, lest they should be in any degree prejudiced in any proceedings which may hereafter be instituted. We have the fact stated in the return, that these men were delivered on board the *Severn* on a specific charge, and were merely detained until a fit opportunity could be found for safely conveying them to *London*, to be dealt with according to law. That is sufficient to justify us in ordering their further detention. It is said that this is a novel proceeding. I certainly do not re-

1823.

Ex parte KRANS.

collect any instance like the present, where persons were brought up from an intermediate custody, with a view to another inquiry. If upon this return, connected with the other documents in the case, we saw plainly that these persons were unlawfully detained in custody, it would be our duty to discharge them; but if we do not see any illegality in their detention, it is equally our duty to put the matter into some course of legal inquiry. That it is lawful for any person, whether a public officer or not, to take into custody any person charged with the commission of an offence, and keep him until he can be taken before a proper tribunal, is a proposition not to be denied. Suppose, for instance, an application made at the sitting of the Court, for a habeas corpus to be directed to a person, not a public officer, to bring up the body of a man alleged to be detained in his custody, without any lawful cause, and the writ being served immediately, the party before the rising of the Court brought up his prisoner, and made a return to the writ, stating that the person whose body he brought into Court was delivered into his custody upon a charge of a capital felony, in order that he might be taken before a magistrate, to be dealt with according to law, should we order the prisoner to be liberated upon such a return? Clearly not. But it is alleged here, that these persons have been detained an unreasonable length of time, so long indeed as to make the detention altogether illegal, and an extreme case is put of a detention for two or three years, which, it is said, might be justified upon the same principle. I do not mean to say that the detention may not be so long as to shew that the ground of detention is not a just ground, and is altogether unfounded; and in such a case the Court would deal with it as justice required. But can we say that a detention of thirteen or fourteen days is, under the circumstances of this case, an unreasonable detention? My opinion, however, does not turn upon the length of the detention. Here are persons taken into custody under cir-

1823.

Ex parte KRANS.

cumstances which justify a suspicion that they are guilty of a capital offence; they are placed for security on board one of his Majesty's ships, stationed not far from the shore; they are numerous; they are taken as smugglers; and it is not every moment of the day that it would be safe to land so large a body of men, and take them before a magistrate. Assuming that the magistrates in the local jurisdiction had authority to investigate the case, still it might be thought prudent that the prisoners should be taken to *London*, for the purpose of conveying them before some competent tribunal, where their conduct might be investigated, and the fact ascertained whether there was any reasonable ground for the further detention of all or any of them. Under such circumstances I cannot say that the length of time during which they have been detained is unreasonable, the cause of their original detention being a lawful cause. Not being, under the circumstances, an unreasonable length of time, I think we ought not to discharge these persons. We are of opinion that the proper course for the Court to take (whatever may be its power of interfering in the first instance, in the way in which magistrates and justices of the peace generally act), is to direct that the prisoners shall be taken before some competent tribunal, in order that the matter may be further investigated, and the fact ascertained upon the merits of the case, whether there is any ground for their farther detention. If, after this, any unreasonable delay shall take place, it may be competent to the parties to make a further application, and then the Court will adopt such steps as may appear necessary for expediting the proceedings, so that no injustice shall be done. It seems to us that this is the fit and proper course for the Court to adopt towards the advancement of public justice. The rule therefore which the Court pronounces is, that the prisoners be committed to the custody of the Marshal of the Marshalsea, in order that they may be taken at the first convenient opportunity before some competent authority, to be examined touching the matters contained in the return to the habeas corpus, and dealt with according to law.

BAYLEY, HOLROYD, and BEST, Justices, concurred.

1823.

Ex parte KRANS.

The prisoners were then committed to the custody of the Marshal of the Marshalsea, in pursuance of the rule pronounced by the Court.

BEALE *v.* BIRD.

Monday, Feb. 10.

The Court will not compel the plaintiff to deliver to the defendant a copy of an agreement, in order to enable the latter to plead in abatement that the agreement was signed jointly by himself and others.

A RULE had been obtained on a former day in this case, calling on the plaintiff to shew cause why he should not deliver to the defendant a copy of a certain agreement in the possession of the plaintiff, upon which the action was brought, for the purpose of enabling the defendant to plead in abatement. The action was brought on an attorney's bill, to recover extra costs incurred by the plaintiff for professional business, done, as was alleged, on the joint account and retainer of the defendant and other persons, in pursuance of an undertaking to which they were all subscribers.

Campbell shewed cause, and contended that this application was unprecedented, and could not be supported upon any principle of justice. The object of the motion, if obtained, would impose the greatest hardship on the plaintiff, and tend to defeat his just claim for costs in a proceeding of which the defendant had the benefit. The Court would not allow a defendant to crave oyer of a deed for the purpose of pleading in abatement, and à fortiori they would not permit him to have a copy of an agreement for a similar purpose.

Curwood, in support of the rule, urged that this was a reasonable application. The object of the action was to compel the defendant alone, to pay the costs incurred, not for his benefit only, but for the benefit of himself jointly

1823.

BEALE v. BIRD.

with others, who had signed the agreement in question. The defendant might thereby be made liable for 500*l.* when, perhaps his liability ought not to exceed 50*l.* Under such circumstances the justice of the case required that the defendant should be placed in a condition to dispute his liability for the whole of the plaintiff's demand.

Per Curiam.—This experiment is quite new, and we ought not to encourage an application which would enable the defendant to interpose vexatious delay, and perhaps defeat the plaintiff's claim. Great injustice might be worked by this proceeding if we were to allow it, because, unless the plaintiff could prove the signature of every one of the subscribers to the agreement, his action might be defeated. If the defendant is made liable in the first instance for the whole of the plaintiff's demand, he may sue his co-subscribers for contribution.

Rule discharged, with costs.

Monday, Feb. 10.

SMITH v. DOBSON.

The affidavit to postpone a trial, on the ground of the absence of a witness, need not state the name of the witness, suggested to be material and necessary.

IN this case, the question was, whether the affidavit made to postpone a trial, on the ground of the absence of a material and necessary witness, should state the name of the witness.

Abraham contended, that the practice of the Court required the name of the witness to be mentioned in the affidavit, but

The Court said, they knew of no such rule, and therefore made the

Rule absolute, for postponing the trial.

Chitty was for the defendant.

Ward v. Levi.

Monday, Feb. 10.

Where hired bail, who were insolvent, of whom notice had been given, and to whom no exception was entered, became bail in error and the plaintiff treating the writ of error, and the bail as nullities entered up judgment and took out execution:— Held, that the execution was regular, and the Court discharged the rule for setting it aside, with costs.

THIS was a rule calling on the plaintiff to shew cause why the writ of *fi. fa.* and execution thereon, should not be set aside with costs for irregularity, the alleged irregularity being, that execution was sued out upon the judgment, notwithstanding the allowance of a writ of error, under which bail in error had been put in and perfected.

Platt now shewed for cause, that the bail in error were men of straw, and absolutely beggars. The affidavit upon which he shewed cause, stated that the persons who had become bail in error, were in the habit of hiring themselves as bail, receiving each time, in consideration of their trouble, the sum of half a crown each; that they had been partners together for twelve years as hired bail; that one of them lodged on a back garret, and that the other lodged in a back room in the second floor in the house in which he resided. The affidavit further stated the belief of the deponent, that the writ of error was merely brought for delay. On these grounds he contended that the plaintiff was at liberty to treat the allowance of a writ of error and the bail thereto, as nullities, and sue out execution upon the judgment. He cited the case of *Crum and others* v. *Kitchen and another*, *Hil.* 1820 (*a*), where the Court, under precisely similar cir-

(*a*) *Crum* v. *Kitchen*, Hil. 1820. This was a similar application to the present, and under the like circumstances, *Bayley*, J. observed, that upon mesne process the plaintiff had the security of the sheriff or the bail bond, but in error he had no security but the bail, who were answerable, not for the person of the defendant, but the actual payment of the debt, and he declared that as no error was suggested on the record, such bail being put in to a writ of error was a gross fraud upon the Court and its suitors, and though the rule did not ask for costs, yet to mark the sense which the Court entertained of such disgraceful practices, the rule should be discharged with costs, and it was so discharged accordingly.

Scarlett and *Platt* were for the plaintiff, and *F. Pollock* for the defendants.

1823.

WARD v. LEVI.

cumstances, discharged a like application to the present, with costs, and he now prayed that this rule might also be discharged with costs.

Gurney, contrà, contended, that as the plaintiff's attorney had had notice of the bail in error, without excepting to them, they must be considered as good bail, having been allowed to justify without opposition. Bail in error having been put in and perfected, the plaintiff was not at liberty to take out execution. It was the duty of the plaintiff's attorney to have excepted to the bail, if upon inquiry, he was not satisfied with their solvency, but he could not now complain of the consequences of his own laches, the bail being allowed without opposition. Whatever prospective rule the Court might think proper to lay down in cases of this nature, with a view to prevent similar abuses, still as no such rule had been hitherto promulgated, they would hardly deprive the defendant of the benefit of his writ of error, bail having been put in without exception. The case cited on the other side not being in any book of Reports, the Court would hardly act contrary to what had hitherto been considered the established practice.

ABBOTT, C. J.—I think the case to which we have been referred, was correctly decided, and is an authority for a similar decision in this instance, and consequently this rule must be discharged with costs. Persons who become hired bail must at least learn, that they are not to become bail in error. This writ of error is evidently brought for delay from the very description of bail which have been put in, and if it were possible to prevent practices of this description we should most gladly do it. Certainly we shall do every thing we can to discourage them, because nothing tends so much to bring reflection upon the administration of justice as conduct of this description. Persons of this class are often put in as bail merely to gain a little time, but are

immediately excepted to, and no great harm is done, but we must discourage the practice of their becoming bail in error. We shall discharge the rule with costs.

1823.
WARD
v.
LEVI.

HOLROYD, J. (*a*) concurred.

BEST, J. also concurred, and said, that the persons put in as bail in this case were no bail at all. This was a mere fraud upon the Court and upon the plaintiff.

Rule discharged, with costs.

(*a*) *Bayley*, J. was absent.

YARWORTH *v.* MITCHEL.

Monday, Feb. 10.

An infant who sues by his prochein amy need not give security for costs, even though the prochein amy is sworn to be insolvent.

THIS was a rule calling upon the plaintiff, an infant, who sued by his father, as prochein amy, to shew cause why the proceedings in the action should not be stayed, until he gave security for costs, on an affidavit, stating that the prochein amy was insolvent, and in no condition to pay costs, and that he had admitted in a conversation with the deponent, that he had nothing to do with the costs, but that a friend would see him righted.

Walford shewed cause, and said that the question in this case was in effect, whether under any circumstances an infant plaintiff could be called upon to give security for costs. He maintained that he could not, and cited an anonymous case in C. P. (*a*) where it had been expressly held, that the Court would not oblige an infant plaintiff to give security for costs.

(*a*) 1 Marsh. 4.

1823.
YARWORTH
v.
MITCHEL.

Chitty, contrà, relied upon *Doe*, d. *Selby* v. *Alston* (a), where *Buller*, J. said, "there are only three instances in which the Court will interfere on behalf of a defendant to oblige the plaintiff to give security for costs: the first is, when an infant sues, the Court will oblige his prochein amy, or guardian or attorney, to give security for the costs; second, when the plaintiff resides abroad, in which case the Court will stay proceedings till security is given for costs; and third, where there has been a former ejectment."

Per Curiam.—We shall act upon the last decision in the Common Pleas. If we were to hold that the prochein amy, who in this case happens to be the father of the infant, must give security for costs, it would in many instances absolutely prevent an infant from suing, however just his cause of action might be.

Rule discharged, without costs (b).

(a) 1 T. R. 491.

(b) Vide 2 Tidd. 61.

Tuesday, Feb. 11.

ANONYMOUS.

Where the captain of a merchant ship, domiciled in this country, was detained by a plaintiff for a considerable time to give evidence in a cause, but before issue was joined or notice of trial given:—Held, that the Master was at liberty in taxing the costs, to allow the expence of maintaining the witness during such detention.

IN this case, the Master, on the taxation of costs, allowed the expences of maintaining the captain of a merchant ship, who was detained in *England* for a considerable time, to give evidence in the cause, but before the cause was at issue. The witness was a *British* subject and domiciled in this country, but was at all times liable to be called upon to go to sea and discharge his professional duties. On shewing cause against a rule for reviewing the Master's taxation, the question was, whether he was justified in allowing the expences of a witness detained under such circumstances.

1823.



ANONYMOUS.

After hearing *Marryat* in support of the rule (*Campbell*, contrà, being stopt,)

ABBOTT, C. J. said, we are all of opinion, that the Master was justified in the allowance of the expences in question. It is true that the witness is not a foreigner; he is a native of this country and domiciled here; but he is a seafaring man, and if he had not been detained in *England* for the purpose of giving evidence in this cause, he might have pursued without control that line of life in which he is engaged. Now, unless the expences of detaining a person so circumstanced can be allowed, the greatest hardship would be imposed on the individual. In many instances persons in his situation cannot afford to maintain themselves out of their own funds, and it is unlikely that they would stay unless they had a prospect of being indemnified for their loss of time and expences. Persons of this description cannot be detained by compulsion. In this instance the witness was at liberty to leave the country at any time before he was subpœnaed. He cannot be subpœnaed until issue is joined, and notice of trial given. If before the subpœna is served upon him, he may leave the country, the parties must incur still greater expences in bringing him home afterwards to give evidence, a consequence which would be highly injurious to the plaintiff, and would produce a considerable delay of justice, which is always to be avoided. Considering the situation of this individual, and the circumstances under which he was detained, I cannot say that the Master has exercised an unsound discretion. There is no complaint as to the amount of the taxation, and as we see no objection to the principle upon which the expences were allowed, this rule must be discharged.

Rule discharged.

1823.



Tuesday, Feb. 11.



The KING *v.* The JUSTICES of GLOUCESTERSHIRE.

By statute 49 *Geo.* 3. c. 68. s. 5. the notice of appeal in a matter of bastardy must specify the cause and matter thereof. Where a notice given by the reputed father of a bastard child of his intention to appeal against an order of filiation, merely stated that he intended to prosecute an appeal against an order of filiation, whereby he was adjudged to be the father of a female bastard child, born of the body of *E. H.*, and chargeable to the parish of *S. L.*, pursuing the words of the order without specifying the particular grounds of appeal:—Held, that the notice of appeal was insufficient.

THIS was a motion for a mandamus to the Justices at Sessions to enter continuances, and hear an appeal in a matter of bastardy; and now, on shewing cause against the rule, the question was, whether the notice of appeal given by the appellant, was in conformity with the stat. 49 *Geo.* 3. c. 68. s. 5, which requires that the party appealing shall give ten clear days notice of his, her, or their intention of bringing such appeal, *and of the cause and matter thereof,* &c. The notice given by the appellant in this case was of his intention "to prosecute an appeal against an order of filiation, whereby the appellant was adjudged to be the reputed father of a female bastard child, born of the body of *Elizabeth Hay*, which had become chargeable to the parish of *South Lea*, in the county of *Oxford*." The notice was a mere echo of the form of the order, without stating any specific grounds of appeal. The Sessions considered this notice insufficient, and therefore dismissed the appeal.

Bligh, in shewing cause against the rule, contended, that the notice which had been given, was not in conformity with the requisites of the statute, which required two things, first, that the party appealing, should give notice of his *intention* to appeal; and, second, that the notice should contain a statement *of the cause and matter thereof*, which meant the specific grounds of objection to the order of filiation. The notice in this case was no more than a notice of intention to appeal, and was totally silent as to the cause and matter thereof, and consequently was insufficient. He cited *Rex* v. *The Justices of Salop* (*a*).

(*a*) 4 Barn. & Ald. 626.

G. Cross, contrà, insisted, that the notice which had been given, did, in substance, convey to the parties interested the grounds of appeal. An order of filiation contained a variety of matters, against each of which the reputed father of a bastard, had a right of appeal; namely, the sum awarded for apprehension, the expences of the mother's lying in, the weekly maintenance of the child, and the adjudication of filiation. The notice in this instance contained a sufficient specification of the ground of appeal, inasmuch as it stated expressly that the party appealed against the adjudication that he was the father of the child. This must be understood to mean that he objected wholly to that part of the order which adjudged him to be the father. Under this notice the respondents must necessarily infer that the appellant only meant to dispute the fact of his being the father of the child named in the order, as being born of the body of *Elizabeth Hay*, without regard to any of the other matters contained in the order. There being several other grounds upon which he might have appealed, the necessary inference was, that he intended to confine his appeal to that which adjudged him to be the father of the child. It seemed, therefore, to be unnecessary that the notice should contain any further statement of the cause and matter of the appeal.

Abbott, C. J.—I am of opinion that this notice was insufficient. The act of parliament requires that the notice of intention to appeal, shall also contain a specific statement of the cause and matter thereof, and then proceeds to require that the Justices at Sessions shall determine the cause and matter of such appeal. That clearly means the merits and not merely the form of the order. Here the notice simply contains a description of the order, whereby the appellant is adjudged to be the father of the child, without stating any ground of objection to such adjudication. It

1823.
The KING
v.
The JUSTICES of GLOUCESTERSHIRE.

does not go on to allege any objection to the adjudication in point of form or substance, and there is therefore nothing specific so as to direct the attention of the respondents to the grounds of appeal. The respondents are left entirely to guess at the objections, and must go to the Sessions unprepared as to those points, which it may be necessary for them to prove in evidence. This notice is merely a description of the order, whereby the appellant is adjudged to be the father of the child, and does not contain any statement of the cause and matter of appeal, and consequently it is not in compliance with the statute.

HOLROYD, J. (a)—The object of the statute is to require a statement in the notice of the particular grounds of objection to the order of filiation upon the merits. A notice as to the order itself is not sufficient, unless it also contains a statement of the grounds of appeal touching the matter thereof, in order that the respondents may come to the Sessions prepared to meet the cause and matter of the appeal, and not merely the form of the order.

BEST, J.—This notice does not specify the cause and matter of the appeal, but merely describes the order itself, which is clearly insufficient.

Rule discharged.

(a) *Bayley*, J., was absent.

1823.

Ex parte Pilgrim.

Tuesday, Feb. 11.

The statute 34 *Geo.* 3. c. 14. s. 2. requires that the indentures of an attorney's clerkship shall be enrolled, together with an affidavit of the time of executing the same, before the clerk shall be admitted to practise as an attorney; and enacts, that unless the indentures are enrolled within six months next after execution, together with the affidavit, the service shall be deemed to commence from the time of enrolment only. Where a clerk had been articled to an attorney in the country, and the indentures had been sent up to *London* to be enrolled in the Master's office pursuant to the statute, and after the clerkship had been served, no trace of the indentures could be discovered in the Master's office, the Court refused to admit him, although it appeared from the books of the town agent, that a clerk of the latter had paid the fees payable in the Master's office upon enrolment, cotemporaneously with the time when the enrolment was supposed to have taken place.

GASELEE moved to admit this gentleman as an attorney of the Court under the following circumstances:—In 1817 Mr. *Pilgrim* was articled to an attorney in the city of *Bath*. Within a month afterwards the original articles being duly executed, were sent up to his master's agent in *London* for the purpose of being enrolled, pursuant to the statute 34 *Geo.* 3. c. 14. s. 2 (*a*). Having served his clerkship, and being about to apply for admission, he searched the Master's office for the purpose of making the usual affidavits of service of notices, &c., and could find no trace of the articles having been enrolled, nor obtain any information in the office to account for the omission, or the loss of the articles. In the books of his master's agent an entry was found in the hand-writing of one of the clerks (cotemporaneous with the time when the enrolment was supposed to have been made), of the payment of a fee of five shillings, at the Master's office, for attending and enrolling the articles. That clerk was now at the *Cape of Good Hope*, but there was an affidavit verifying his hand-writing. In addition to

(*a*) Which enacts, "That no person, who by any such contract as aforesaid, made after, &c. is or shall be bound to serve as a clerk as aforesaid, shall be admitted to be a solicitor or attorney in any of the said Courts, unless the indenture or other writing, containing such contract, duly stamped according to the directions of this act, shall be enrolled or registered with the proper officer, to be appointed for that purpose in the Court wherein such person shall propose to be afterwards admitted a solicitor or attorney by virtue of his service under such contract, together with an affidavit of the time of the execution of such contract by such clerk; and in case such indenture or other writing shall not be enrolled or registered in such Court within six months next after the execution thereof, together with such affidavit of the time of the execution of such contract, then in such case the service of such clerk, under such indenture or writing, shall be deemed to commence from the time of such enrolment or registry only, and not from the execution of such indenture or writing; any usage or custom to the contrary notwithstanding."

1823.

Ex parte PILGRIM.

this the counterpart of the articles was now produced, together with an affidavit of the attesting witness verifying its due execution. There was also an affidavit of the due payment of the stamp duty required to be paid. Under these circumstances he now prayed to be admitted, and the case of *Ex parte Clarke* (*a*) was cited.

Per Curiam (*b*).—Much as we lament the hardship of the case, we find it impossible to get over the words of the act of parliament. They are peremptory, and cannot be relaxed. The 2nd. sec. enacts, that "no person shall be admitted unless the indenture shall be enrolled with the proper officer of the Court, together with an affidavit of the time of the execution of the same; and in case such indenture shall not be enrolled within six months next after the execution thereof, together with such affidavit at the time of execution, then in such case the service under the indenture shall be deemed to commence from the time of such enrolment only, and not from the execution of the indenture; any usage or custom to the contrary notwithstanding." Now there is nothing in the circumstances of this case which will allow us to dispense with the necessary proof that the articles have been duly enrolled. There is even no foundation to lead us to a reasonable belief that they had ever been enrolled. Had there been an affidavit produced from the Master's office, shewing that any fee had been paid at the time of enrolment, although the indentures might have been lost, then we might consider whether we should not direct the counterpart to be enrolled nunc pro tunc. But there is nothing to satisfy us that the indentures had ever been in the Master's office. There is reasonable evidence certainly that the articles were duly executed, and that this gentleman had served his clerkship, but we cannot surmount the obstacle which the words of the act interposes with respect to enrolment.

Admission refused.

(*a*) 3 Barn. & Ald. 610.

(*b*) *Abbott*, C. J., was absent.

1823.

The KING v. ROGIER and Another.

Tuesday, Feb. 11.

Keeping and maintaining a common gaming house, and for lucre and gain, causing and procuring idle and evil disposed persons to come there to play together, at "Rouge et Noir," and permitting such persons to play at such game for large sums of money, is an offence indictable at common law.

INDICTMENT against the defendants for a nuisance, in keeping a common gaming house. The first count charged, that *Charles Edward Rogier* and *William Southwell Humphrey*, on, &c. unlawfully did keep and maintain a certain common gaming house, and in the said common gaming house, for lucre and gain, did cause and procure divers idle and evil-disposed persons to frequent and come to play together, at a certain unlawful game at cards, called "Rouge et Noir;" and in the said common gaming house, on, &c. unlawfully and wilfully did permit and suffer the said idle and evil-disposed persons to be and remain playing, and gaming at the said unlawful game called "Rouge et Noir," for divers large sums of money, to the great damage and common nuisance, &c. Second count was the same as the first, only charging the defendants with keeping and maintaining a certain common gaming room. Both counts charged the offence as an offence at common law, not against any statute. Plea, Not Guilty, and Issue thereon. At the trial before *Abbott*, C. J., at the *Middlesex* Sittings after last Term, the defendants were found guilty.

Curwood and *Platt* now moved to arrest the judgment. This is an indictment at common law, and unless the offence with which it charges the defendants be a common law offence, the indictment cannot be supported. The indictment charges, first, the keeping and maintaining a common gaming house; and, second, the permitting a certain unlawful game called "Rouge et Noir" to be played in the said house, neither of which acts is an offence at common law. Mr. Serjeant *Hawkins* is the first writer who lays it down as a dictum, that the keeping a gaming house is a common law offence, or, in other words, a nuisance per se,

1823.

The KING v. ROGIER.

which it must be, in order to come within the scope of this indictment, and his language is not very decisive on the subject, being only, "it hath been said that all common gaming houses are nuisances in the eye of the law." (a) A very modern author ventures indeed much further; for, in the last edition of *Burn's* Justice, it is said, "it is clearly agreed that all *common gaming* houses are nuisances in the eye of the law;" (b) and he cites *Hawkins's* Pleas of the Crown, and *Russell*, on Crimes (c), as authorities in his favor. It has been already shewn that the former of these by no means warrants the assertion in *Burn*, nor does the latter, the language there being founded only on the same dictum in *Hawkins*. It cannot indeed be denied that a gaming house may, by improper management, become a nuisance; but it is not so per se, which this indictment charges it to be. Then with respect to the game of "Rouge et Noir," the indictment is evidently bad. No gaming of any description is an offence at common law, as is clearly proved by the various statutes which have been passed for the express purpose of making it an offence. But every one of those statutes sets out by name those games which are prohibited as unlawful, and in no one of them is the game of "Rouge et Noir" mentioned. The inference therefore becomes irresistible; first, that, independently of the statute law, *all* games are lawful; and, second, that this particular game not being prohibited, remains to this day lawful also. There are indeed two separate allegations in this indictment, first, that the playing was illegal, and, second, that the game of "Rouge et Noir" was illegal; but the first is not stated in the indictment. Now it is illegal, and the second is not illegal; therefore, if either of the allegations is imperfect, the offence is insufficiently described, and the defendants are not called upon to answer it. Upon either of these grounds therefore, first, that the keeping a gaming house is not per se an offence as here laid; and, second,

(a) 1 Hawk. P. C. c. 75. s. 6.
(b) Chetwynd's ed. vol. ii. p. 582.
(c) Page 433.

1823.

The King v. Rogier.

that the game of "Rouge et Noir" cannot be noticed now, for the first time, by the Court as illegal, when all games not prohibited by statute (which that is not) are lawful; this indictment is bad, and the defendants are entitled to have the judgment arrested (*a*).

Abbott, C. J.—I am of opinion that the evidence in this case was quite sufficient to support the indictment, and that consequently there is no ground for the present motion. It is not necessary, on the present occasion, to decide whether the keeping a common gaming house is per se a nuisance, or whether the game of "Rouge et Noir" is per se an illegal game, though the inclination of my mind is strongly in favor of the affirmative of both those questions. But allowing, for a moment, that both those questions may be answered in the negative, still there are allegations in this indictment which, if they are supported by the evidence, will clearly render both the acts charged offences at common law. If a common gaming house be so conducted that it becomes a receptacle for idle and disorderly persons, who are permitted to assemble there and enter into play for sums of an illegal amount, it becomes a public nuisance, and the maintaining it is an offence indictable at common law; and if the game of "Rouge et Noir," or any other game, however innocent in itself, is played at by such persons, and to an excessive amount, it becomes an illegal game, and those who hold out to others the means of so playing at it are guilty of a common law offence. Now, to apply these positions to the present case:—The indictment charges, "that the defendants unlawfully did keep and maintain a certain common gaming house, and in the said house, for lucre and gain, did cause and procure divers idle and evil-disposed persons to frequent and come to play together, at a certain unlawful game at cards, called "Rouge

(*a*) Vide 33 Hen. 8. c. 9. ss. 11, 12, and 14. 25 Geo. 2. c. 36. s. 5. 58 Geo. 3. c. 70. 5 Bac. Abr. *Nuisances* (A); and 1 Hawk. P. C. c. 92. s. 14. et seq.

1823.

The King v. Rogier.

et Noir," and unlawfully and wilfully did permit and suffer the said persons to be and remain playing and gaming at the said unlawful game for divers large sums of money." Then does the evidence support these allegations? It is in proof that the defendants' house was frequented by persons of tender age and limited incomes, and who there hazarded not only more than they could properly afford to lose of their own, but actually staked the property of their employers, and *that* not unfrequently whilst in a state of intoxication. I can entertain no doubt that such persons, in such a situation, completely satisfy the meaning of the words "idle and disorderly," and that their admission to the house in question rendered it a nuisance, and the maintenance of it an offence at common law. It is further in proof that persons, such as I have described, played at the game of "Rouge et Noir;" that 100*l.* notes were often staked at a single round by individuals, and that thousands were occasionally won by the defendants at that game in the course of one evening. The very essence of illegal gaming is the playing at the game to *excess*; the statute law, in some instances, limits the amount that can legally be lost or won at one sitting to 5*l.*; and can it then be doubted that the playing at this or at any other game to the amount I have mentioned, is excessive, and consequently illegal? I certainly have no hesitation in declaring that it is; and when I further take into consideration the very cautious mode of admission into the house—the double doors, and the guards stationed at them—the temptation held out to the visitors to indulge in liquors freely, gratuitously provided, even to intoxication, and the careful and constant sobriety of the proprietors, I cannot but see, on the one hand, a consciousness that the business carried on there was unlawful; and, on the other, a premeditated design to allure the unguarded to share in that business for the profit of the defendants alone. If it should be thought that this interpretation of the common law on this subject requires confirmation, I think it is to be confirmed from two sources; first, by the very numerous

convictions which have taken place under common law prosecutions for similar offences; and, second, by the language of the statute 25 *Geo.* 2. c. 36. s. 5. where it is said, that "in order to *encourage prosecutions* against persons keeping bawdy houses, *gaming houses*, or other disorderly houses," the expences of such prosecutions shall be paid by the overseers of the poor of the parish in which the house indicted is situate, from which it is clearly to be inferred that the legislature then meant to describe the keeping a common gaming house as a previously indictable offence. I am therefore decidedly of opinion that the indictment in this case is good in point of form; that it was substantially supported by the evidence; and consequently that there is no ground for the present motion in arrest of judgment.

Bayley, J.—I am entirely of the same opinion, and fully concur in the reasoning of my Lord Chief Justice upon the subject; to which I will only add that the statute 58 *Geo.* 3. c. 70, is couched in similar terms, and evinces the same understanding on the part of the legislature as is manifested by the language of the previous statute of 25 *Geo.* 2. c. 36.

Holroyd, J.—I am also of the same opinion. I think the reasons which are given in *Hawkins* for the dictum which has been cited and objected to, are perfectly satisfactory, and go the full length of shewing that the offence charged in this indictment, and proved at the trial, is an offence at common law; and that the language of the statutes plainly indicates that the legislature, in passing them, adopted and acted upon that idea. I can therefore see no pretence for the present application.

Best, J.—I should be extremely sorry if I thought it possible for any unbiassed mind to entertain a doubt upon this subject. It is quite clear that any practice which has a tendency to injure the public morals, is a common law

1823.

The King v. Rogier.

offence, and that I take to be the foundation of the dictum to be found in *Hawkins*. To me it is equally clear that the practices charged in this indictment, and of which these defendants have been convicted by a Jury, have such a tendency, and are therefore indictable in the present shape. With regard to the particular game described in the indictment, I think the name there given to it is perfectly immaterial; no game is unlawful in itself, but every game may be rendered so by playing at it for an excessive stake; for it is the amount played for, and not the name or nature of the game, which is the essence of it, and which constitutes it an offence in the eye of the law. But, as it seems to me, the consideration of that branch of the subject is not necessary, for there is quite enough charged in the indictment, and proved at the trial, to render these defendants guilty of a misdemeanour in the mere management of the house of which they were the proprietors.

Rule refused.

The defendant *Rogier* was sentenced to pay to the king a fine of 5000*l*., and to be imprisoned one year in the *Middlesex House of Correction*, and the defendant *Humphrey* to pay a fine of 200*l*. and be imprisoned in the same place of confinement for two years.

Wednesday, Feb. 12.

Bignold v. Holding.

Though bail justify by consent at the Judge's Chambers, the practice of the Court requires that a rule for the allowance of bail should, notwithstanding, be served on the plaintiff or his attorney.

ON motion to set aside the proceedings on the bail bond in this case for irregularity, the question was, whether, when bail are justified by consent at a Judge's chambers, it is necessary that the defendant should give the plaintiff or his attorney notice that the bail have justified, or serve him with a rule for the allowance of bail.

The Court, after consulting with the Master, said, the practice of the Court required that a rule for the allowance of bail should be served, notwithstanding the bail had justified by consent at chambers, but on payment of costs they made the rule absolute.

Rule absolute, on payment of Costs.

Walford for the plaintiff, and *F. Pollock* for the defendant.

Doe, on the Demise of Payne *v.* Grundy.

Wednesday, Feb. 12.

Where a lessor of the plaintiff dies after the commission day at the Assizes, and is nonsuited upon the merits of the ejectment, his executor is not liable for the costs under the common consent rule given by the testator in his life-time.

Comyn, on a former day, obtained a rule to shew cause why the executrix of the lessor of the plaintiff should not pay the costs of the nonsuit in this action, pursuant to the postea and allocatur thereon, upon the ground that the nonsuit had taken place on the merits, and that the testator, who had died after the commission day at the last Assizes for *Warwick*, where the cause was tried, had entered into the common consent rule.

Reader shewed for cause that there was nothing in the case to take it out of the general rule of law that an executor is not liable for costs, because the consent rule being merely personal, could not affect the executrix, and no undertaking by the testator could operate after his death, so as to deprive his executrix of the privilege appertaining to her in that character. He cited *Doe* v. *Ford* (a), as conclusive against the motion.

Comyn, contrà, relied on *Thrustout* v. *Bedwell* (b), where the lessor of the plaintiff having died before the Assizes, and the plaintiff being nonsuited for not confessing lease, entry, and ouster, the Court refused the executor the costs

(a) 2 Smith, 407. (b) 2 Wilson, 7.

1823.

DOE
v.
GRUNDY.

of the rule. He distinguished this case from *Doe* v. *Ford*, because here the testator had died *after* the commission day, which he contended made all the difference.

Per Curiam.—The case cited from *Wilson* does not go the length of holding an executor liable to pay costs, it merely decides that under certain circumstances he cannot recover them. The testator's undertaking to pay the costs is no contract as between the present parties, and cannot affect his executrix. No action could be maintained upon the consent rule, either against the testator, if he had lived, or against his executrix, inasmuch it is no contract. It is an undertaking to pay, but not by way of contract. The judgment in this case is against *John Doe* only, not against the lessor of the plaintiff. The case of *Doe* v. *Ford* is decisive as to the law upon this subject, and it would be great injustice to deviate from the rule there laid down in a case like the present.

Rule discharged.

REGULA GENERALIS.

Hilary Term,
3 & 4 *Geo.* IV. 1823.

IT IS ORDERED, that no commission for taking affidavits in this Court be issued to any person practising as a conveyancer, unless such person be also an attorney or solicitor of one of the Courts at *Westminster*; and that no such commission shall issue without an affidavit, made by the person intended to be named therein, that he is not, and doth not intend to become a practising conveyancer, or that he is an attorney, or solicitor, duly inrolled in one of the said Courts; and hath taken out his certificate for the current year.

BY THE COURT.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

EASTER TERM,

IN THE FOURTH YEAR OF THE REIGN OF
GEORGE IV.

JACKSON *v.* PEARSON and Another (*a*).

1823.

An action does not lie upon the Black Act, 9 *Geo.* 1. c. 22. s. 7. against two of the inhabitants of the hundred by name. It must be brought against the inhabitants at large; and this is an objection in arrest of judgment.

THIS was an action of debt, under the statute 9 *Geo.* 1. c. 22. s. 7. against the defendants, as two of the inhabitants

(*a*) The following warrant, under the king's sign manual, having been issued to the Judges of this Court, under the authority of the statute 3 *Geo.* 4. c. 102, was in *Hilary* Term openly and publicly notified and declared in Court, in pursuance of the said statute, viz.

Warrant authorizing the Judges to hold a Special Sitting.

GEORGE R.

WHEREAS by an act passed in the Session of Parliament, holden in the third year of our reign, intituled "An act to repeal an act of the first and second year of his present Majesty, for facilitating the despatch of business in the Court of *King's Bench*, and to make further provisions in lieu thereof," it is, amongst other things, enacted, that from and after the passing of the said act, it shall and may be lawful to and for us, our heirs and successors, and we and they are thereby authorized, from time to time, as to us or them shall seem meet, by warrant under our or their sign manual, directed to the Judges of our said Court, to direct and require the Judges of our said Court, or any two or more of them, to meet at *Serjeants' Inn Hall*, *Westminster Hall*, or some other convenient place, to be by them appointed, on such and so many days in the vacation, or interval between any Terms, as to us, our heirs and successors, shall seem fit and proper, for the despatch of such matters as at the end of the Term mentioned in such warrant may be depending in our said Court, whether on the crown or plea side

1823.

JACKSON v. PEARSON.

of the hundred of *Gosford*, in the county of *Suffolk*, to recover damages for the injury sustained by the plaintiff, also an inhabitant of the hundred, in having had his barn and some straw wilfully destroyed by fire. At the trial before *Best*, J., at the last Summer Assizes for *Suffolk*, the plaintiff had a verdict.

H. Cooper, in *Michaelmas* Term last, obtained a rule nisi in arrest of judgment, upon the ground that the action was ill brought, two of the inhabitants of the hundred having been made defendants, whereas the statute directed the remedy to be against the hundred at large.

Storks now shewed cause, and contended, first, that the action was properly brought against the present defendants; and, second, that the objection, if tenable, was matter in abatement, and should have been so pleaded. With respect

thereof: And whereas we have been given to understand, that numerous matters are now depending in our said Court, which cannot be despatched during this present *Hilary* Term, and which ought to be despatched with all convenient speed; now, therefore, we do hereby, in pursuance of the said act, direct and require you the Lord Chief Justice and other Judges of our said Court, before us, or any two or more of you, to meet at *Serjeants' Inn Hall*, *Westminster Hall*, or some other convenient place, to be by you appointed, according to the said act, on the day next after the end of this present *Hilary* Term, and from thence daily, until the 1st day of *March* next, for the despatch of such matters as may be depending in our said Court at the end of this present *Hilary* Term, whether on the crown or plea side thereof.

Given at our Court at Carlton House, the 1st day of *February*, 1823, in the Fourth year of our reign.

By His Majesty's Command.

To the Lord Chief Justice and other the Judges of our Court before us.

The *Lord Chief Justice* then gave public notice, that in obedience to his Majesty's command, two or more of the Judges would meet in some convenient apartment in the *Guildhall*, at *Westminster*, on *Thursday*, the 13th day of *February*, for the despatch of such business as remained undisposed of at the close of the then present Term.

Accordingly, on *Thursday*, the 13th of *February*, *Bayley*, *Holroyd*, and *Best*, Justices, assembled in an apartment at the *Guildhall*, *Westminster*, and sat continuously from the said 13th of *February* until *Friday* the 28th *February*, both days inclusive, *Sundays* excepted.

to the first point there is nothing in the statute which justifies the position, that all the inhabitants shall be made defendants in this form of action. A liberal construction must be put upon the statute, it being a remedial and not a penal law. This was decided in *Ratcliffe* v. *Eden* (a), where the same thing is said with respect to the stat. of *Winton*, 13 *Edw.* 1. st. 2. c. 2, which gives an action against the hundred generally. The act 9 *Geo.* 1. c. 22. says, that "the inhabitants" shall be liable, and that the injured party shall recover his damages from "the inhabitants." It does not include the word "all," and therefore any portion of the inhabitants is sufficient to satisfy its directions. The liability imposed by the act is thrown upon property, not upon persons, and so long as the party sustaining damage has the means of obtaining a remuneration for his loss, it is of no consequence what individuals are in the first instance made defendants in the action. There is a provision in a subsequent part of the 7th clause, that where the plaintiff has obtained a verdict, he may sue out execution against "*any* of the inhabitants," and "*all other* the inhabitants" shall be rateably taxed in contribution of the sum levied. Then, as the statute expressly provides that any number of the inhabitants may be proceeded against for the damages when a verdict has been obtained, the inference is irresistible, that it meant also to render any number of them liable in the action by which that verdict is sought. Upon the second point he cited *Steward* v. *Howey* (b), and *Bloxham* v. *Hubbard* (c).

H. Cooper and *B. Andrews*, contrà, were stopt by the Court.

BAYLEY, J.—I am of opinion that this rule must be made absolute. The plaintiff has not pursued the remedy which the statute provides, and must suffer the conse-

(a) Cowp. 485. See Doug. 699. (b) 3 Keb. 126. (c) 5 East, 407.

1823.
JACKSON v. PEARSON.

quences of his error. The statute declares generally, that "the inhabitants" shall be sued, and declares in express terms that "all the inhabitants" shall contribute to pay the damages recovered. From this it must be inferred that *all the inhabitants* are to be sued. In the present case two individuals, described as inhabitants, are made the defendants; they may have been inhabitants when the action was brought, but non constat that they will continue to be so up to the time when the damages are levied; and therefore this mode of declaring defeats the very object of the statute, which is, that the whole body of those who were inhabitants when the injury was sustained should be liable for the damages when they are recovered: for if the present defendants ceased to be inhabitants between the period of the action brought and the execution sued out, they certainly would not be liable upon the judgment. The cases of *Thurtell* v. *Mutford* (*a*), and *Fowler* v. *Loningborough* (*b*), are authorities to shew, that in actions founded upon this statute, the directions of the statute must be formally and precisely attended to. That has not been done in the present case, and consequently the action cannot be supported. I am also of opinion that the defendants have taken the proper course in raising this objection by a motion in arrest of judgment, instead of pleading in abatement, because I think the plaintiff's irregularity is matter of error and not of abatement. Upon both grounds, therefore, the defendants are entitled to have the judgment arrested.

HOLROYD, J.—I am of the same opinion. I am quite satisfied that the objection taken here is matter of error, and not ground for a plea in abatement, and that the proper mode of raising it was by a motion in arrest of judgment. I am equally convinced that the action is ill brought against these two defendants. The remedy given by the statute is not against any portion of the inhabitants as individuals; it

(*a*) 3 East, 400. (*b*) 3 J. B. Moore, 319. S. C. 1 Brod. & Bing. 64.

is against the hundred at large, as a corporate body; and it is so given for this plain reason, that the inhabitants of a hundred being a fleeting body, the party aggrieved might never be able to insure himself that the persons against whom he recovered a verdict would continue inhabitants of the hundred up to the moment when he sued out his execution on the judgment. And this argument also proves that no plea in abatement would support this objection; for how could the defendants know what individuals ought to have been joined in the action, when the whole body is perpetually fluctuating and changing?

BEST, J.—The plaintiff has sustained an injury, for which, both in law and justice, he is entitled to redress, and it is much to be regretted that he has mistaken his course for obtaining it. From the nature of the case, I have, throughout, felt a strong anxiety to get over this objection, but I am reluctantly compelled to avow that it is impossible to do so. The evident intention of the legislature in passing this statute was, that the inhabitants at large, as a body, not as individuals, should make satisfaction to the party aggrieved, and it would be inflicting upon individuals a burthen not contemplated by the statute, if any portion of them might be made liable in such an action. The cases mentioned by my Brother *Bayley* are conclusive, to shew that the provisions of the act must be strictly pursued, and the rule now laid down is by no means anomalous, but is perfectly consistent with the general practice of the law. In all cases of indictments against parishes and corporations, we know that the whole body must be made defendants; the prosecution cannot be supported against any two or more of the inhabitants; it must be against the whole as a corporate body.

Rule absolute.

1823.



The KING v. WEIR and Others.

If a warrant be directed to a constable by name, he may execute it any where within the jurisdiction of the magistrate; but if it is directed to him by his name of office, he can execute it only in the parish, &c. of which he is a constable. Therefore where a warrant for levying a rate was directed "to the constables of the parish of *W.*, and to all others, his Majesty's officers whom these may concern," and a constable of *W.*, in attempting to execute it in the parish of *D.*, was assaulted: Held, that the assault was justifiable.

INDICTMENT against the defendants for assaulting *James Ritchie*, one of the constables of the parish of *Woolwich*, in the due execution of his office. Plea, Not Guilty. At the trial before *Richards*, C. B., at the *Kent* Summer Assizes, 1822, it appeared that the defendants were servants of the *Kent Water Works Company*, having the superintendence of their steam engine and premises, situate in the parish of *St. Paul, Deptford.* The company having been assessed by the commissioners under the *Woolwich* Poor, Paving and Watching, and New Gaol Acts, refused to pay the assessment, upon the ground that they were not legally rateable, and consequently a distress was levied upon their premises at *Deptford*, under a warrant directed "To *Charles Sargent*, one of the collectors of parochial rates of the parish of *Woolwich*, in the county of *Kent*, *to the constables of the said parish, and to all others*, his Majesty's officers, whom these may concern." On the 18th of *June*, 1821, the prosecutor *Ritchie*, with an assistant, entered the premises, in execution of this warrant, when they were forcibly expelled by the defendants, without being able to effect their object. This was the assault complained of. It was objected for the defendants, that as the warrant was directed to the constables of *Woolwich*, and all other constables generally, the prosecutor, who was a constable of *Woolwich*, was, by the language of the warrant, limited to act within the jurisdiction of that parish only, and had no authority beyond it; and that consequently, as he had served the warrant in the parish of *St. Paul, Deptford*, he had acted illegally, and the indictment could not be sustained. The case of *Blatcher* v. *Kemp* (a) was cited in support of the objec-

(a) 1 H. Bl. 17, note.

tion, which was over-ruled, but the learned Judge reserved the point for the consideration of the Court upon a motion to enter a verdict of Not Guilty, and the defendants were found guilty.

Marryat, in *Michaelmas* Term last, obtained a rule nisi to set aside the verdict of guilty, and enter a verdict of not guilty.

Tuddy, Serjt., *Andrews*, and *Claridge*, now shewed cause. There is a manifest distinction between the present case and *Blatcher* v. *Kemp*. There the warrant was directed to each constable of the county within his own district, and consequently each was limited to his peculiar jurisdiction; here, the warrant is directed generally to all the constables of *Woolwich*, and to all others, and the prosecutor being one of those constables, was authorized to act any where within the county of *Kent*. The language of the warrant does not restrict any one of the parties to his own particular parish, and where the direction is to particular constables, it is quite immaterial whether they are mentioned by their names, or by their descriptions as constables of any particular place. This very distinction is taken by Lord *Mansfield*, in *Blatcher* v. *Kemp*. There does not appear to be any case in the books precisely similar in its circumstances to the present, neither is there any case to be found in which it is held, that such a description of the constable as the present is insufficient to give a general jurisdiction over the county at large. The office of a constable is the material part of his description, and is at least as extensive as that of his name. Where a warrant is directed to all the constables of a county generally, each is undoubtedly limited to his own parish; but it is not so here. The designatio personarum here is full and distinct, and must clearly be intended to cover the entire jurisdiction of the magistrates under whose authority the constables are to act. The authority of Lord

1823.
The King v. Weir.

Hale (*a*), seems to support this construction; for he says, "If a warrant be directed to the constable of *D*., he is not bound to execute it out of the precincts of his constablewick; but if he doth, it is good." And again, "If a warrant be directed by a Justice of Peace to the constable of *D*. to arrest a felon, he is not bound to go out of the vill where he is constable to execute the warrant; but yet if he do execute it in another vill it is good enough; for he acts herein not simply as constable of *D*., but by virtue of the Justice's warrant." (*b*) It is true that this is said in cases of felony, but the principle seems to be the same, and to be equally applicable to civil process, and it is recognized in the more recent case of *Rex* v. *Kendal* (*c*), by *Holt*, C. J., without any qualification. The case of *Rex* v. *Chandler* (*d*), though apparently opposed to this argument, will not bear out the contrary position, because there was no positive decision there upon this point. It is also said by Dr. *Burn*, "If a warrant is directed to two or more jointly, yet any one of them alone may execute it." (*e*) Lord *Coke* also lays down the same rule; and says, "If a sheriff, upon a capias directed to him, make a warrant to four or three, jointly or severally, to arrest the defendant, two of them may arrest him, because it is for the execution of justice (*f*). This is a dictum directly in point, applied to a case of civil process, and supported by a powerful reason, namely, the execution of public justice. Upon all these authorities, therefore, as well as for the furtherance of justice, it seems clear, that wherever there is a general direction to all the constables of a county, any one of them may act in any part of the county, and, as the constable here has acted strictly upon that principle, there is no ground for the present application, and this rule must be discharged.

(*a*) 1 Hale's P. C. c. 50, p. 581.

(*b*) 2 Hale's P. C. c. 13, p. 110.

(*c*) 5 Mod. 81.

(*d*) 1 Lord Raym. 546. Carth. 508.

(*e*) 1 Chetwynd's Burn. J. P. tit. *Arrest*, 174, citing Dalton, c. 169.

(*f*) Co. Litt. 181 a. Vide *Milsom* v. *Green*, 5 East, 233; and *Prestidge* v. *Woodman*, ante, 43.

Marryat, *Gurney*, and *Bolland*, contrà, were stopt by the Court.

Bayley, J.—It is of great importance that accuracy should be observed in the direction of process of this nature, in order that the party who is to submit to it may know that it is executed by a person having authority for that purpose. Questions of the deepest interest may depend upon his knowledge of that fact, because, in case of resistance, where the death of the person serving the process ensues, that resistance may assume the different characters of murder, manslaughter, or justifiable homicide, according to the validity of the authority, and his knowledge of it. I agree, that where a warrant is directed to an individual by name, his jurisdiction is co-extensive with that of the Justices who signed it, and in such cases the party served need only be informed of the name of the party serving it. On the other hand, where it is directed generally to all the officers of a district by their name of office only, each one is limited to the jurisdiction of his own particular parish. The present is a middle case. The warrant here is directed specifically by the official character "to the constables of *Woolwich*," and the question is, to what extent of jurisdiction they are limited. I am of opinion, that both from the cases which have been decided upon this subject, and from the plain reason of the thing, each is limited to his own parish. The authority was given to *Ritchie*, as constable of *Woolwich*, not personally as *A. B.* nor generally as one of the constables of the county, and therefore I think he had no authority to act beyond the parish of *Woolwich*. This distinction is expressly taken in the case of *The Village of Chorley* (a), where it is said, "if a warrant be directed to all constables, &c. generally, it shall be taken respectively, and no constable can execute the same out of his precinct." And this is founded in good sense and reason, for the name of a constable is a thing easy to be learnt, and likely to be

(a) 1 Salk. 176.

1823.
The King v. Weir.

known, but his character and office are not, at least beyond the limit of his own parish, and no man is bound to know that he fills the character when he goes out of his own parish. The same distinction is expressly taken by *Holt*, C. J. in *Rex* v. *Chandler*, when he says, "where a warrant is directed generally to all constables, it shall be taken respectively to each of them within their several districts, and not to the constable of one parish to take a distress in another parish." In addition to these is *Tooley's case* (*a*), which bears very strongly and pointedly upon the present, for it goes the full length of determining, that where a warrant directed to the constable of one parish, is executed in another, resistance, and even the death of the constable, is justifiable; and that case was very similar to the present, for there the warrant was directed to the constable by his official character only, without any limitation in terms. Upon the whole, therefore, whether I consider the law as settled by the authority of the cases, or the just reason and propriety of the thing, I am of opinion that no constable is justified in executing out of his own parish a warrant directed to him by his name of office generally, and consequently that the prosecutor in this case has exceeded his authority, and the defendants resistance was justifiable.

Holroyd, J.—I am of the same opinion. I think the constable of *Woolwich* had no authority to act out of his district. I take the governing principle to be this: where the warrant is directed to a constable, describing him by his name of office only, it conveys no special delegation of power beyond his own precinct. In this case the warrant is directed to *C. S.* by name, as an officer, and then "to the constables of *Woolwich*." The effect of the latter direction is to give them power as constables merely, and consequently to limit their authority to the district in and for which they are constables. I think, as well upon the authorities,

(*a*) 2 Lord Raym. 1300.

as upon reason and principle, the constable in this case had no jurisdiction beyond the parish of *Woolwich*. The case of *Regina* v. *Tobley* seems to me to be quite decisive of the point, and governs the present. The dicta in *Hale* also appear to me to imply the same conclusion. They hold, that where a warrant is directed to a particular officer, by name, he *may* act out of his own immediate jurisdiction. So it is held also in *Rex* v. *Chandler*. But all these cases assume that the warrant is directed specially by name, and not by office only; and thus construed, I think they tend materially to confirm and strengthen *Regina* v. *Tooley*. Upon this view of the subject, and upon the authority of the cases mentioned by my learned Brother, I am of opinion that the service of this warrant was illegal, and therefore that this rule ought to be made absolute.

Best, J.—We are bound to take care that the office and duty of constables shall rest upon a clear, broad, and intelligible principle, so that the constables on the one hand may know what warrants they are to execute, and where to execute them, and on the other, that the parties upon whom they are to be executed, may know when and where they are bound to obey. Nice distinctions will be productive of great confusion, and will often produce that resistance which happened in *Regina* v. *Tooley*. The plain, clear, and broad principle upon which this case is to be governed, is this, namely, that the magistrate may direct his warrant to any one by name, or direct it to a person by his official character. If it is directed to the party by name, he may execute it any where within the limits of the jurisdiction of the magistrates; if it is directed by the name of office, it can only be executed in the district where the party is an officer. In the first case, the jurisdiction given to the constable is co-extensive with that of the signing Justices; in the second, it is limited to his own particular and personal district; and this seems to me to be obvious to common sense. If I,

1823.
The King v. Weir.

being possessed of an authority extending over a certain limit, appoint another, *by name*, to exercise that authority for me, I evidently mean to make him my representative, and to give him a jurisdiction equal to my own; but if I appoint him *by office*, I mean only to give him a jurisdiction limited to his own office, and inferior to my own. The cases alluded to by the Court, particularly *Regina* v. *Tooley*, and *Rex* v. *Chandler*, in my opinion, most clearly lay down this rule of construction, and I think we are bound to follow that rule in the present case.

Rule absolute for entering a verdict for the defendant.

Lord Huntingtower v. Ireland.

The Bribery Act, 2 *Geo.* 2. c. 24. s. 7. is to be construed prospectively, and not retrospectively. Where a declaration on this statute alleged that the defendant had received a bribe "for giving his vote," and the evidence negatived any promise or agreement for a bribe previous to the election:—Held, that the case was not within the statute, and that the objection was ground for a nonsuit.

DEBT for penalties under the 2 *Geo.* 2. c. 24. s. 7, for bribery at the last general election, for burgesses to serve in parliament for the borough of *Ilchester*. The declaration contained two sets of counts; the first, charging the defendant with receiving a bribe *before* he voted, and the second, charging the receipt *after* he voted; but in both the allegation was, that he had received the bribe "for giving" his vote. At the trial, before *Richardson*, J., at the last Summer Assizes for *Somersetshire*, no sufficient evidence being adduced in support of the first set of counts, upon them the defendant had a verdict; but there was evidence to shew the receipt of money by the defendant after he had voted. It was however objected that those latter counts could not be sustained, because the words of the allegation "for giving his vote," were not consistent with the language of the statute "to give," &c. and were in themselves equivocal, and conveyed no specific or intelligible charge. The learned Judge however over-ruled the objection, and the plaintiff

had a verdict on the second set of counts, with liberty to the defendant to move to enter a nonsuit (a).

Adam, in *Michaelmas* Term, moved accordingly, and obtained a rule nisi to enter a nonsuit, and stated the question to be, whether giving money after an election, without proof of a previous contract or promise, was within the Bribery Act.

Gaselee and *E. Lawes* now shewed cause, and made two points. First, that the language of the declaration was consistent with the terms of the statute, and sufficiently plain and certain to express the charge against the defendant; and, second, that the objection, if tenable at all, was an objection upon the record which ought not to have been raised at nisi prius, but should have been reserved for a motion in arrest of judgment. The statute upon which the action was founded, was rather remedial than penal, and ought to receive the most liberal and extended construction. The object of the legislature was to remedy an evil, and if the defendant's offence was brought within the spirit of the act, the Court would not be strict in construing it by the rules of verbal criticism. The offence was in essence the same, whether the bribe was received before or after the vote was given, and if it were to be held that the statute never applied unless distinct evidence was given of an agreement for the bribe previous to the act of voting, the offence could scarcely ever be made out, and a wide door would be opened for the practice of bribery and corruption. It was perfectly reasonable, that after evidence that the money was

(a) Another objection taken at the trial was, that there was no sufficient proof that two of the candidates, averred in the declaration to have been present at the election, were in fact present; but the learned Judge over-ruled that objection, on the authority of *Combe* v. *Pitt* *, and *Morris* v. *Hunt* †.

* 1 Sir W. Bl. 523.

† 1 Chit. Rep. 453.

1823.

HUNTINGTOWER v. IRELAND.

paid and the vote given, the promise and agreement should be implied. An agreement to vote for a pecuniary consideration, even though the vote was not in fact given, was an offence within the statute. So also was the agreeing to forbear to vote, though the party afterwards voted. The period when the money was paid was quite immaterial; for if the defendant voted under the expectation and belief that he should receive money for so voting, that was an offence substantially within the statute. But if the objection taken for the defendant had any weight, it was an objection upon the record, and ought not therefore to have been taken at nisi prius. It is impossible that the words "for giving" could mean "to give;" they had clearly a retrospective sense, and must be construed as "for having given." Here was therefore not an ambiguity, but a direct variance between the declaration and the statute, and of that the defendant could only avail himself by a motion in arrest of judgment, or by a writ of error.

Adam, *Selwyn*, and *C. F. Williams*, contrà, were stopt by the Court.

BAYLEY, J.—Two questions are proposed for our consideration in this case. First, whether the language of the act of parliament applies to the case where no promise or agreement to give the vote, is proved to have been made prior to the act of voting, so as to make the receipt of money for having voted, an offence within the law; and second, whether the objection urged on the part of the defendant was properly taken at the trial, or is an objection upon the record, which ought to have been reserved for a motion in arrest of judgment. Upon the first, much has been said respecting the policy of giving an equitable construction to the statute, but to which we cannot give any weight. This is a penal law, and is to be construed, like all others of a similar nature, strictly; the distinction uniformly

taken by the Court between penal and remedial laws, is too well known to require explanation, and too long established to admit of a departure from it, in this instance. We must look to the precise language of the statute. It is said in sect. 7, "if any person who shall receive, &c. or shall agree to receive, &c. *to give* his vote, or *to refuse or forbear to give* his vote." What is the meaning of these words, and what offence do they define? The words are clearly prospective, and not retrospective, and the offence is evidently the taking, or agreeing to take, a bribe, *in order to give* the vote, at a subsequent period. This, I think, is the interpretation which plain sense and reason would put upon this clause, and certainly most consistent with the probable intention of the legislature, in providing a remedy for the mischief contemplated. We are therefore not warranted in construing this clause retrospectively. There are, however, some other parts of the act which may shew what was passing in the mind of the legislature at the time it was enacted. In the first section we find the oath which is to be administered to the voters, is this:—"I swear that I have not received any sum, &c. *in order to give* my vote at this election," which is clearly prospective, and cannot possibly be regarded in any other sense. It is argued, that it is quite as great a mischief to receive a sum of money after the party has voted, as before; that may be so, but the oath applies only to what has been passing before the election. If the legislature had intended to bind the conscience of the voter farther, they might have added to the oath, after the word "received," the words "and I will not receive for having given my vote." But these words are not introduced. The 8th section also throws some light upon this subject. By that section, offenders against the act, discovering others, are to be indemnified. But what is the time within which their disclosure is to afford protection, and to what period is the disclosure to have reference? Within twelve months, not after they have received a bribe *since* the election, but

within twelve months "next after such election." Therefore if it should turn out that there was nothing given to vote until after the election, the party would not be within the protection of the discovering clause. But without laying any particular stress upon these provisions, (except that they have a tendency to shew that it was at least doubtful whether the legislature meant to carry the words of the act beyond their apparent and ordinary sense), I think the section in question must be construed prospectively, and not retrospectively. With respect to the second point, I am of opinion that the objection was properly taken at the trial as for a nonsuit, and is not an objection upon the record. The allegation in the declaration is, that the defendant received money "for giving" his vote, &c. If the words had been for "having given" his vote, then I think the objection would have been one upon the record; but the words used in the declaration are at most equivocal or ambiguous; not in plain and express variance with the words of the statute, but so equivocal that their real meaning cannot be ascertained with proper legal certainty, and consequently they convey no sufficient charge against the defendant. In substance, the objection to the declaration is, not that it charges a wrong offence, but that it charges no offence at all, within the statute, and that I think was an objection properly taken at the trial. Indeed it was absolutely necessary to take the objection then, or it could never have been taken; for after verdict, equivocal language in a declaration is cured, upon this ground, that the Court will presume that the Judge at nisi prius did his duty, and confined the evidence to the penal and substantial part of the declaration; but that rule will not hold where the gist of the offence is not within the statute. *Avery* v. *Hoole* (a). Upon both points, therefore, I am of opinion that this action is not maintainable, and a nonsuit must be entered on those counts upon which the plaintiff had a verdict.

(a) Cowp. 825.

HUNTING-TOWER v. IRELAND.

HOLROYD, J.—I think the rule for entering a nonsuit must be made absolute. It has been argued that we are to construe this act of parliament as if it were remedial. In one sense of the word, all penal acts are remedial, inasmuch as they tend to remedy an evil or mischief which has prevailed. But that is not the meaning of the distinction between a remedial and a penal act. The term "remedial" is applicable to those acts only where a remedy is given to the party injured; the term "penal" is applied where the remedy given is to be construed strictly, and not beyond the terms. This is a penal statute, and is to be construed literally and strictly. Whether it was the intention of the legislature that the statute should have a retrospective as well as a prospective operation, it is unnecessary to consider, because, upon the face of the act there is nothing to warrant us in giving it a retrospective construction. This is clearly demonstrated by the language of the 7th section. The words "to give," as here used, must mean "in order to give." The words "to forbear" cannot be retrospective, because no man can forbear to do an act which he has already done. This construction of the clause upon which the action is founded is the only one that can rationally be put upon it, and is, I think, strongly corroborated both by the preceding and subsequent clauses. I am also of opinion, that this objection was properly raised at nisi prius. If the declaration had charged the offence in the retrospective sense, the only evidence necessary to produce would have been payment of the bribe after the act of voting, and then the objection would have been on the record, and could not have been taken but in arrest of judgment. But that is not the case, and though the declaration would perhaps have been held bad on demurrer, still as the defendant did not demur, and as after verdict it is presumed he understood the allegation made against him, by his having joined issue, the only opportunity of taking the objection was at the time of the trial. The case of *Avery* v. *Hoole* cited by my

1823.
HUNTINGTOWER v. IRELAND.

Brother *Bayley*, appears to me to be precisely in point on this subject, and upon both questions I am of opinion that the defendant is entitled to judgment of nonsuit.

BEST, J.—I feel as strongly as any man in this country the mischievous tendency of the baneful practice of bribery at elections, a practice which can have no other effect than to bring discredit upon a body to which every good subject looks up with reverence and respect; and as far as it is in my power I will endeavour, consistently with the rules of law, to suppress it. I am of opinion, that if it could be put down, every practicable objection to the election of members to serve in parliament, would be removed; but we must take care, that in our station as Judges, we do not transgress the rules of law. If the law is not strong enough for the purpose, there is another body to which appeal may be made, and will not be made in vain for its extension. I am clearly of opinion, that the case now presented to us does not come within the statute upon which the action is founded. There is one set of counts charging that the defendant had voted in consequence of a previous agreement to give him a sum of money, and another, that after he had voted he had received a sum of money, without stating that it was in consequence of a previous agreement. The first charge is negatived by the evidence. Then the question upon the second is, whether if a man having voted without any previous agreement, afterwards takes a sum of money, he commits any offence within the meaning of the bribery act. I am decidedly of opinion, that he does not. Whether he commits an offence against the common law of the country is another matter, but that is not now the question. Has he committed any offence within the meaning of this act of parliament? I think all the terms of the statute shew most clearly that it applies only to a case where there has been a previous agreement to give a bribe in order to vote, and not to that where money has been given after the election without a previous agreement. The

1823.

HUNTINGTOWER

IRELAND.

act is unquestionably both remedial and penal. The administration of the latter part only appertains to us; the other is in the hands of the House of Commons, who have it in their power to administer it, by excluding the member unworthily elected, from his seat, and substituting the person injuriously kept out. But the penal part of this law is severe enough; its disqualifications are irrevocable; the offence it constitutes is one "nullâ virtute redemptum;" and therefore in applying such a law, it is not enough to attend to the spirit of its enactments, we must tie ourselves down to the very letter. I think the present case does not fall within either the spirit or the letter of the law. It is possible that a man who has given an honest and conscientious vote, may afterwards, his poverty, but not his will, consenting, submit to accept a gratuity for the vote he has given. Where the money is previously paid, a great difference arises, and it would ill become us to level to the same degree of crime consenting poverty and deliberate corruption. No evil consequences can result from our decision to-day. That legislature from whom the law emanated, may revise and extend it; we cannot do either; we have only to administer it as we receive it from them. I fully concur with the rest of the Court in all the arguments they have brought to bear upon the case, and I am clearly of opinion that the defendant is entitled to judgment of nonsuit.

Rule absolute.

The like judgment was entered in another case of *Lord Huntingtower* v. *Gardiner*, which depended upon the same question.

1823.



LACY and BROOKE *v.* WOOLCOTT and TUCKER.

Where one of two partners in trade had, after an act of bankruptcy, accepted a bill of exchange in the name of the firm, without the privity of his copartner:—Held, that in the hands of an innocent indorsee it was an available security.

ASSUMPSIT against the acceptors of two bills of exchange. The defendant *Woolcott* suffered judgment by default, and *Tucker* pleaded the general issue, Non Assumpsit. At the trial before *Abbott*, C. J. at the *Middlesex* Sittings in *Hilary*, 1822, a verdict was found for the plaintiffs, with 420*l.* damages, subject to the opinion of the Court upon the following case:—

The defendants, from the year 1818, had carried on business in partnership as glasscutters. On the 8th *September*, 1820, one *Edward M'Donell*, at the instance of one *Thomas Mower Keats*, drew the two bills upon which the action was brought, and which were in these terms:—"200*l.* *London*, 8 *Sept.* 1820. Three months after date pay to my order two hundred pounds, value received. *Edw. M'Donell.* To Messrs. *Woolcott* and *Tucker*, glass merchants, No. 127, *High Holborn*. Accepted, *Woolcott* and *Tucker*. Indorsed, *Edw. M'Donell*; *Edw. Mayo*." The second bill was in the same terms, except that it contained the indorsement of *Keats* between those of *M'Donell* and *Mayo*. *Woolcott* accepted the bills in the name of his firm, the only consideration for which was an unstamped post obit bond, in which one *Ramsden* was the obligor, and who was at the time a prisoner in the King's Bench Prison. The acceptance and consideration were private transactions of *Woolcott*, unknown to *Tucker*, and unconnected with the partnership business. On the 14th *September*, *Mayo* received the bills from *Keats*; the consideration between them being valuable and boná fide. On the 19th of *September*, *Mayo* indorsed one of the bills to the plaintiffs in the usual course of business, and on the 6th of *December* indorsed the other to the plaintiffs in the same manner; the plaintiffs

1823.

LACY
v.
WOOLCOTT.

making no inquiry respecting the firm of the defendants, but taking the bills wholly upon the credit of *Mayo*, with whom they had considerable dealings, and who was indebted to them for goods sold at the period of both the indorsements. In *July* or *August* previous to these transactions, the defendant *Woolcott* committed an act of bankruptcy, and a commission issued against him on the 27th of *September*, under which he was duly declared a bankrupt. The question for the opinion of the Court was, whether the defendant *Tucker* was liable to the payment of these bills, they having been accepted by the defendant *Woolcott* in the name of the firm, but on his own private account, and after he had committed a valid act of bankruptcy. If the Court should be of opinion that he was liable, the verdict to stand, otherwise a nonsuit to be entered.

Hutchinson, for the plaintiffs, was stopped by the Court,

Comyn, for the defendant, being called upon, contended, that as *Woolcott* had committed an act of bankruptcy previous to his accepting the bills, the partnership between him and *Tucker* was in law dissolved, and therefore he had no power to bind the firm by an acceptance in their name. It had been decided in *Ramsbottom* v. *Lewis* (*a*), and *Thomason* v. *Frere* (*b*), that after a secret act of bankruptcy one partner has no power to dispose of the partnership property by an act of his own, done in the name of the firm; and by parity of reasoning, he could have no power under such circumstances to lay the firm under a new responsibility, or to make the partnership funds liable to a future claim originating in his own act. There was no case in which this was distinctly laid down as law, but it was a necessary inference from the decision in the cases cited. *Woolcott* was in fact no longer a partner,

(*a*) 1 Campb. 278. (*b*) 10 East, 418. See Chitty on Bills, 35.

1823.

LACY v. WOOLCOTT.

and could therefore do no act to bind the partnership, whether by a transfer of partnership property, or by a creation of partnership liability. The judgment therefore ought to be for the defendants.

Per Curiam.—This case presents no difficulty, and admits of no argument. The doctrine now urged, if it were sanctioned by a court of law, would be productive of the most mischievous consequences to commerce. It is clear, that a man who suffers himself to appear to the world as a partner in a firm, is liable to all the responsibilities incurred by the firm, although he be not in reality a partner, and it was so held by Lord *Kenyon*, in the case of *Baker* v. *Charlton* (a). That case was the exact converse of the present, and in principle applies to it pointedly. There the plaintiff was the innocent holder of a bill drawn by a firm, of which the defendant was a partner, but which he offered to prove was not the firm by which the bill transactions of the partners were carried on. Here the plaintiffs are innocent indorsees, having taken the bills bonâ fide and for a valuable consideration. They see the acceptance of "*Woolcott* and *Tucker*" upon the bills; those persons were then in fact partners, so far as their joint transactions with the world could make them such; one of them, indeed, had previously committed an act of bankruptcy, and in law, perhaps, the partnership was dissolved. But they continued to hold themselves out to the world ostensibly as partners, and therefore each was bound by the acts of the other. The cases of *Ramsbottom* v. *Lewis*, and *Thomason* v. *Frere*, by no means support the argument now contended for; they only went the length of deciding, that after a secret act of bankruptcy committed by one partner, the other cannot, by an indorsement in the name of the firm, transfer the property in a bill belonging to the firm before the bankruptcy. That decision is not at all inconsistent with our decision in the present case. Here a

(a) Peake's N. P. C. 80. See *Williamson* v. *Johnson*, ante, 28*.

man who is de facto and ostensibly a partner, accepts bills in the name of his firm, and although he had then committed an act of bankruptcy, still there is no doubt that his acceptance was the acceptance of the firm, and renders his partner liable to an innocent indorsee. The judgment of the Court therefore, must be for the plaintiffs.

Judgment for the plaintiffs.

OXENHAM, Gent. one, &c. *v.* LEMON and Others.

Where an attorney is retained jointly by several parties to defend a suit against each, delivery of a bill to *one* is sufficient to entitle him to maintain a joint action against all for his costs, within 2 *Geo.* 2. c. 23. s. 23.

Agreeing to refer the quantum of damages to arbitration, after a question of law has been reserved by the Judge at the trial, does not waive an objection to the defendants liability in the action, after the arbitrator has made his award.

ASSUMPSIT on an attorney's bill. At the trial before *Richardson*, J. at the last assizes for *Somersetshire*, it appeared in evidence that the present defendants, four in number, had been defendants in four separate suits instituted in the Court of Exchequer, respecting a parish modus, in which, as parishioners, they were all interested, the question being the same in all the causes; that the present plaintiff, at the request of the defendant *Lemon*, who acted for all, and took upon himself the whole management of the business, had conducted their defence in those suits; the original instructions to defend the suits were given by *Lemon*, but all the defendants had occasionally conferred with the plaintiff on the subject, had recognised him as their professional adviser in the suits, and had called respecting the settlement of his bill. At the close of the business, the plaintiff delivered in a bill containing his charges against all the defendants, to *Lemon*, which not being paid, the present action was brought against all the defendants jointly. Two questions were raised; first, whether there was sufficient evidence of a joint retainer by all the defendants, and second, whether the delivery of a joint bill to one defendant only was a proper delivery under the statute 2 *Geo.* 2.

1823.

OXENHAM v. LEMON.

c. 23. s. 23. The learned Judge left the first as a question of fact to the Jury, who found that there was a joint retainer, and reserved the second for the opinion of the Court, and the plaintiff had a verdict, with liberty to the defendants to move to enter a nonsuit upon the point of law reserved. It was, however, agreed in the mean time, to refer the amount of the plaintiff's bill to a gentleman at the bar, and upon the reference, a sum of 5*l.* was taken off.

Manning, in *Michaelmas* Term last, having obtained a rule nisi to enter a nonsuit,

Jeremy now shewed cause, and objected, in the first instance, that as the defendants had agreed to refer the amount of the damages to arbitration, this was a waiver of all objection to their legal liability, and consequently the Court could not entertain an application to enter a nonsuit; the motion should have been to set aside the award, if objectionable. He referred to *Peters* v. *Anderson* (*a*), but

The Court said, that the agreement to refer the amount of the damages was not a waiver of the question as to liability, unless it appeared from the Judge's report that the defendants had expressly consented to abandon the objections taken at the trial.

Jeremy, in addressing himself to the point reserved, was stopt by the Court, and

Manning was called upon to support the rule. The defendants being severally parties to four separate suits, and having each separate interests to defend, each was by the statute entitled to have a separate bill of costs delivered. There was no evidence in the case to shew that the defendant *Lemon*, to whom alone the plaintiff's bill was

(*a*) 1 Marsh. 238.

delivered, received any authority from the other defendants to employ an attorney for them, or to conduct their defence on their behalf. In this respect, therefore, this case was materially different from *Crowder* v. *Shee* (a). It was there held, that "where several are jointly liable to an attorney for business done, the delivery of a copy of a bill to one of them, *from whom the attorney has received his instructions*, is sufficient." That decision was founded upon the ground that one of the defendants had, by authority, acted for the rest, and that the plaintiff had known no other person in the business. Now there is no such fact found in the present case, and consequently it is not governed by that decision. The same distinction is to be drawn between this case and *Finchett* v. *How* (b). The words of the statute are, "shall have delivered to the party or parties, or left for him, her, or them, at his, her, or their dwelling-house, a bill." It is true, that both the bill to be delivered and the place of delivery, are in the singular number; but the parties are mentioned in the plural, and reddendo singula singulis, the legislature clearly meant to direct that each of the parties should receive a copy of the bill. Looking to the real object of the statute, and considering the necessity of protecting the interests of suitors by a strict adherence to its directions, the defendants are entitled to judgment of nonsuit.

Per Curiam.—There is no doubt or difficulty in this case. It falls completely within the principle laid down in *Crowder* v. *Shee*, and *Finchett* v. *How*, and if we were to grant the application for a nonsuit, we should in effect overturn those decisions, for which there is no pretence. The defendants here had clearly a joint interest to defend, and the Jury have found as a fact, that their retainer of the plaintiff was joint also. They had a common interest in the question to be decided, although they had a separate interest as to

(a) 1 Campb. 437. (b) 2 Campb. 277.

1823.

OXENHAM v. LEMON.

the quantum of their liability. Could it be contended that these defendants are indictable for maintenance? They had a common interest in the subject-matter of the suits, and they might join to institute or defend them. It is where a person, being a stranger, interferes with the suit of another man, that he becomes liable to the penalties of maintenance; not so where he has a common interest with the suitor on the record. The Jury having found the fact of a joint retainer, it follows that the plaintiff, by delivering one bill to the party from whom he received the retainer, has perfectly satisfied the requisites of the statute. The words of the statute are, "that no attorney shall commence any action for the recovery of his fees until the expiration of one month after he shall have delivered unto the party or parties to be charged therewith, or left for him, her, or them, at his, her, or their *dwelling-house*," not dwelling-*houses*, "*a bill*," not *bills* "of such fees," &c. which clearly shews, that the legislature did not intend that a copy of the bill should be left at the dwelling-house of each person who was jointly liable with others. The statute does not deprive the attorney of his common law right of action, it only directs in what manner the action shall be brought. In point of law, the delivery of a bill to one of several joint contractors is a delivery to all, and is notice to all. These defendants are found to be joint contractors, and there is no ground for excepting them out of the general rule.

Rule discharged.

1823.

WINSTONE and Another *v.* LINN.

Declaration, upon an indenture of apprenticeship, whereby a master covenanted, in consideration of a premium of 90*l.*, to instruct the apprentice in the business of a tobacconist, for four years, and to board and lodge him during that time, alleged, 1. A general breach in the terms of the covenant; 2. A particular breach on the 13th *July*, averring a refusal to instruct on that day or at any other time; and 3. A similar breach as to boarding and lodging on the same day, and alleging, that on that day the master compelled the apprentice to quit the service, and refused to maintain and keep him, contrary to the effect of the covenant. Pleas, 1. Performance of the covenant until the 10th *July*. 2. Willingness to maintain and keep the apprentice during the whole term, but that from the date of the indenture until the 10th *July* the apprentice would not truly and faithfully serve defendant, nor attend to his business, but refused so to do, and setting forth various acts of misconduct on his part during the interval mentioned, and concluding, that on the 10th *July* the apprentice, against the orders of defendant, quitted the service, declaring that he would never return again, whereby defendant was hindered and prevented from performing his covenant. 3. Readiness to instruct and maintain according to the effect of the covenant, but averring neglect and refusal of apprentice to obey defendant's lawful commands on the 10th *July*, and a refusal any longer to serve him, and absconding on that day, whereby he was prevented from performing his covenant. 4. Averring a wrongful absence of the apprentice on the 10th *July*, whereby, &c.; and 5. A denial that defendant had compelled the apprentice to quit his service. Replication took issue on the first and fifth pleas, and as to the other pleas there was a confession of the breaches of duty mentioned therein; but replying, that on the 13th *July* the apprentice returned to defendant, and tendered and offered himself to serve and obey him according to the indenture, but that defendant upon request refused to take him back, &c. Demurrer to the replication to the second, third, and fourth pleas, and joinder therein:—Held, that covenant would lie upon the indenture, notwithstanding the misconduct of the apprentice.—Held also, that there was no departure or discontinuance in the pleadings.

COVENANT upon an indenture of apprenticeship. The first count of the declaration stated, that on 11th *April*, 1820, by indenture made between the plaintiffs, *Thomas Winstone* the elder, and *Thomas Winstone* the younger, of the one part, and the defendant of the other, for the consideration of 90*l.* defendant covenanted with plaintiffs that he should, during the term of four years, from the date thereof, according to the best of his skill and knowledge, teach, or cause to be taught, the said *T. W.* the younger, in the trade of a tobacconist as then followed by defendant, and also should find and provide him with suitable and sufficient diet and lodging in his dwelling-house, in a like manner with the rest of his family, he the said *T. W.* at all times taking his meals with defendant and his family, and not with his servants; and that by virtue of such indenture, *T. W.*, on the 12th *April*, in the year aforesaid, entered into defendant's service according to the tenor and effect of the indenture, and remained in such ser-

1823.

WINSTONE v. LINN.

vice until the time after mentioned. Averment of breaches, first, that although plaintiffs have always performed, &c. defendant did not, nor would, after the making thereof, to the best of his skill, teach, or cause to be taught, said *T. W.* the said trade, but wholly refused so to do. Second, that after, &c. to wit, on the 13th *July*, in the year aforesaid, defendant wholly refused then or at any other time to instruct, or cause to be instructed, said *T. W.* in the said trade. Third, that defendant did not, nor would, after, &c. find and provide *T. W.* with suitable and sufficient diet and lodging in his dwelling-house, &c. but, on the contrary thereof, on the said 13th *July*, forced said *T. W.* to leave his service before the expiration of the time agreed upon for his remaining therein according to the tenor, &c. and refused to maintain and keep him, contrary to the tenor, &c. to the damage, &c. Pleas, 1. That as to so much of the supposed breaches of covenant mentioned, as relate to not teaching said *T. W.*, and not finding and providing him with diet and lodging before the 10th *July*, in the year aforesaid, defendant says, that from and after, &c. until the said 10th *July*, he did, to the best of his skill and knowledge, teach, or cause to be taught, said *T. W.*, in the said trade, and did also find and provide him with suitable and sufficient diet and lodging in the dwelling-house of defendant, according to the tenor, &c. concluding to the country. 2. That as to so much of the said supposed breaches as relate to not teaching said *T. W.*, and not finding and providing him with diet and lodging upon and after the 10th *July*, defendant says, he was ready and willing to teach him the said business, and find and provide him with diet and lodging according to the indenture, during the whole of the said term, but he did not, nor would, well and truly serve defendant as an apprentice in his said trade, or diligently attend to the concerns thereof, but afterwards, to wit, on the 12th *April*, in the year aforesaid, and on divers other days and times, between that day and the 10th *July*, wholly refused

so to do; and on one of those days and times said *T. W.* did wilful damage to defendant, by damaging a cart of his of a large value, then used by him in his business; and said *T. W.*, on several of the days and times aforesaid, refused to obey, and advised other servants of defendant in his business to disobey his lawful orders, and also refused to attend to the lawful remonstrances of defendant, made on occasion of his misconduct, and treated him, defendant, with insult and contempt, and refused to render him proper accounts of his monies from time to time entrusted to him as such apprentice; and that defendant, on the said 10th *July*, ordered him to cast up the day books used in his business, and it was the duty of the said *T. W.*, as such apprentice, so to have done; but he insolently refused so to do, and, on the contrary thereof, against the positive orders of defendant, absented himself from his service, declaring, that he never intended to return, whereby defendant was hindered from teaching, and from finding and providing him with diet and lodging according to the indenture, as he would otherwise have done, to wit, &c.; concluding with a verification. 3d. That defendant was always ready and willing to teach said *T. W.*, and also to find and provide him with suitable and sufficient diet and lodging, according to the tenor, &c. but said *T. W.* on the said 10th *July* refused to obey the lawful commands of defendant, or any longer to serve him as an apprentice, and of his own accord, without the licence, and against the will of defendant, absented himself from the house and service of defendant, whereby defendant was hindered from performing his covenant as he would otherwise have done, &c.; concluding with a verification. 4. That, on the 10th *July*, *T. W.*, without the leave, and against the will of defendant, wrongfully absented himself from his house, and from his service and employment as an apprentice, whereby defendant was hindered from performing his covenant; concluding with a verification. And 5. That as to the supposed breach of covenant relating to

defendant's compelling said *T. W.* to leave his service, defendant did not compel him to leave his service in the manner alleged; with a conclusion to the country. Issue on the first and fifth pleas, and as to the second, third, and fourth, plaintiffs replied, that after said *T. W.* had been guilty of the supposed misconduct and breaches of duty, in those pleas mentioned, and during the said term, &c. and before the exhibiting plaintiffs' bill, to wit, on the said 13th *July*, said *T. W.* returned to defendant, and tendered himself to serve him as such apprentice and was then and there ready and willing, and offered to serve defendant then, and during the residue of the said term, and then and there requested defendant to receive him as such apprentice, and to continue to teach him the said trade, and to find and provide him with suitable diet and lodging, in pursuance of the said indenture; but defendant then and there wholly refused, and from thence hitherto hath wholly refused to teach, or cause him to be taught, the said trade, &c.; and also to find and provide him with suitable and sufficient diet and lodging according to the said indenture; concluding with a verification. Demurrer to the replication, and joinder in demurrer.

E. Lawes, in support of the demurrer. The first and most important question arising on these pleadings is, whether, under any circumstances of misconduct on the part of an apprentice, the master can put an end to the indentures. If the indentures of apprenticeship in this case import a mutuality of obligation between the master and the apprentice, it is quite clear that this action cannot be maintained. The contract, on the part of the apprentice, appears to have been broken, because the replication admits that the apprentice had been guilty of the misconduct imputed to him by the defendant, whereby the latter was prevented from performing his covenant. The condition here is mutual, and the contract as well as the consideration is entire. It has

been decided, that a master is not obliged to take back an apprentice, or return any part of the premium, if he has been guilty of such misconduct as will have the effect of preventing the master from performing his contract. In *Cuff* v. *Brown* (a) it was held, that if an apprentice, after serving a part of his time, and without any misconduct on the master's part, runs away and enlists as a soldier, and afterwards is willing to return, but his master will not receive him, yet he is not bound to return any part of the apprentice fee; and there *Richards*, C. B., said, "May he stay with his master for four years, and then run away when his services are become more valuable, and is the master to lose the benefit of that service? There is no contract to bind the master; for it was at the master's option to take him back or not. The master performs his contract till it was put an end to by the apprentice." This seems a decisive authority; for in the present case the defendant was ready to perform his contract, but it was put out of his power by the misconduct of the apprentice, whose act has in fact dissolved the contract. Unless it is held that the contract in this case is entire, the consequences of a contrary decision would be most serious, because it would be competent for the apprentice to absent himself until the last day of the term, and then come to the master and insist upon his right to maintain an action for the breach of covenant in not teaching and maintaining him. It is a clear principle of law, that where the performance of the contract is prevented by one of the contracting parties, he cannot complain of its non-performance. This principle is recognized in an anonymous case in *Modern Reports* (b), where an action of covenant was brought against an apprentice for leaving his master's service; and *Holt*, C. J. held, that if a master licensed his apprentice to leave him, he cannot afterwards recal that licence. That case is the converse of the present; for here the apprentice has left the service of his

(a) 5 Price, 297. (b) 6 Mod. 70.

1823.
WINSTONE v. LINN.

master, expressing his intention not to return again, and upon the same principle he cannot maintain the present action, on account of the mutuality of the condition. In *Kenyston* v. *Preston* (a), Lord *Mansfield* laid it down, that if one party is ready, and offers to perform his part of the contract, and the other refuses or neglects to perform his, he who is ready and offers, has fulfilled his engagement, and may maintain an action for the default of the other. It seems to follow, that unless he has so fulfilled his engagement, he cannot maintain any action. In the present case the defendant's performance of the covenant is prevented by the act of the apprentice. Another authority in support of the principle already mentioned is 1 *Rol. Abr.* 455, where it is held, that if *A.* be bound to *B.*, and the condition is, that the son of *A.* shall serve *B.* for seven years, if *B.* take the son into his service, but afterwards during the term command him to go from him, the obligation is not forfeited. That is the converse of the present case. So, in the case of *Holcombe* v. *Hewson* (b), it was held, that assumpsit will not lie against a publican for not taking his beer of a brewer, if the brewer do not continue to supply good beer. This case is distinguishable from *Weaver* v. *Sessions* (c), in many particulars. There the contract was not entire or indivisible: there was a liberty given to buy malt of others, and the plea did not connect the malt purchased, with the orders. The statutes concerning apprentices (d), have no bearing upon this case, and are indeed entirely out of the question; for if the Justices alone have jurisdiction over this matter, it is clear that the plaintiff never could sue the defendant for damages. *Gray* v. *Cookson* (e). There is no distinction in principle between a contract by parol, and a contract under seal, and if misconduct of

(a) Doug. 691.
(b) 2 Campb. 391.
(c) 6 Taunt. 154. S. C. 1 Marsh. 505.
(d) 5 Eliz. c. 4. and 20 Geo. 2. c. 19.
(e) 16 East, 13.

an ordinary servant will dissolve the one, it will have the same effect in the case of master and apprentice. If this be so, there are several nisi prius cases in point. *Robinson* v. *Hindman* (a), *Spain* v. *Arnott* (b), *Williams* v. *Rice* (c). This is an action upon a common law contract for damages, and it must be construed by the rules applicable to other cases of the like nature. This then being an entire and indivisible contract, it is clear that the breach of it by the apprentice deprives him of his right of action. The defendant in this case does not at his own peril undertake, at all events, to teach the apprentice, because that must depend upon whether the apprentice will be taught or not. The apprentice having so misconducted himself as to put it out of the power of the master to perform his contract, the latter is discharged of all liability (d). Supposing these objections to the merits of the action be not available, there are objections to the pleadings in point of form, which will entitle the defendant to judgment on demurrer. First, the declaration assigns a general breach of covenant from the time of the execution of the indentures until the 13th of *July*. Upon this, issue is taken. But the replication admits that there was no breach previous to that day, therefore there is a discontinuance of the action, which will entitle the defendant to judgment. The discontinuance is as to the not teaching and maintaining from the 10th to the 13th of *July*. The declaration and issue on the first plea is as to the teaching and maintaining before the 10th of *July*. The rule is, that the plaintiff must follow up his entire demand throughout the whole of the suit; and if any part of it be discontinued in pleading, it is a discontinuance as to the whole (e), for there

(a) 3 Esp. 235.

(b) 2 Stark. 256.

(c) 2 Geo. 4. Middlesex Sittings.

(d) See *Heard* v. *Wadham*, 1 East, 619. *Duke of St. Alban's* v. *Shore*, 1 H. Bl. 273. *Campbell* v. *Jones*, 6 T. R. 570. *Ritchie* v. *Atkinson*, 10 East, 295. *Ratcliff* v. *Pemberton*, 1 Esp. 35. *Jones* v. *Barclay*, 2 Doug. 694. *Anon.* 6 Mod. 76.

(e) See *Harris* v. *Mantle*, 3 T. R. 307.

1823.

WINSTONE v. LINN.

does not continue to be the same demand, which the plaintiff set forth in his declaration. *Gilbert's Common Pleas*, 158. Judgment must be given against the plaintiff if there be a discontinuance as to the subject-matter of the cause, or the parties, on demurrer to the replication, though the defendant's plea be bad. *Tippet* v. *May* (a). Then, secondly, the plaintiff's replication is a departure from his declaration. The declaration states a continuance in the service until the 13th of *July*, and the action is for forcing him to quit the service on that day, and the replication is for refusing to take him back when he returned. This is clearly a departure. The declaration states the plaintiff's continuance in the service until the 13th *July*, and his performance of the indenture; but the replication admits the contrary. This also is ground of general demurrer, as matter of substance. *Niblet* v. *Smith* (b). Then the plaintiff concludes with a general prayer of damages for the breaches of covenant pleaded to, whereas he should have new assigned. *Scott* v. *Dixon* (c). These are objections available on general demurrer, and therefore the defendant is entitled to judgment.

Chitty, contrà, was stopped by the Court.

BAYLEY, J.—I am of opinion that the plaintiffs are entitled to judgment. First, as to the technical objections to the pleadings, I think there is no ground for contending that this is a departure, because a departure is where the party rests his case in the replication upon a different ground from that in the declaration. The replication is to fortify and support the declaration, and not to depart from it. Here the declaration alleges that the defendant forced the apprentice to depart from his service. The defendant in his

(a) 1 Bos. & Pul. 411.

(b) 4 T. R. 504. 2 Saund. 84 d. notis.

(c) 2 Wils. 4. 1 Saund. 299 a. and 6 Mod. 70.

plea states, that the apprentice had disobeyed his orders. The replication is, that the apprentice was willing to go back into the service, but the defendant would not take him in again. That is forcing him to continue away afterwards. The substance of the declaration is, forcing him to absent himself; and the replication states the mode in which he was forced. There is therefore no ground for the first objection in point of form. I am of the same opinion with respect to the supposed discontinuance. A discontinuance may be where the plaintiff claims by his declaration more than he insists upon in his replication, as where he narrows his right, and claims less than what he sets out with in his declaration; but then it must be shewn most clearly, that in the replication the claim is narrowed, before that ground of argument can avail. Here the declaration complains that the defendant did not teach and feed, and did not suffer the apprentice to continue in his service. The allegation is, "that after the making of the indenture, to wit, on the 13th *July*, defendant wholly refused to instruct and maintain him, and forced him to go away." That breach is not in its nature entire, and continuing during the whole period from the time when the indenture was made, until the period during which the indentures were to continue. It is divisible, and requires no period of time to be pointed out to sustain the breach. If the plaintiff can prove, during any period comprehended within the indentures, a refusal to instruct, a refusal to feed, or a forcing to depart, he is entitled to recover in this action; and the fallacy of the argument in this case is, in assuming that it is an entire claim for the whole period of time, the fact being, that it is a divisible claim as to any period of time. The replication does not discontinue, but supports the claim. In his declaration the plaintiff alleges a particular breach respecting part of the time, but in his replication he shews more pointedly what period of time he means. Upon the main question, I am of opinion, that the plaintiff is entitled

1823.

WINSTONE v. LINN.

to judgment. The question is, whether the acts of disobedience on the part of the apprentice set forth in the plea, entitle the master to cancel the indentures, or whether, if the apprentice offers to return to the service, he is not bound to receive him, it not being stated in any part of the pleadings that he had been absent for an unreasonable length of time. This is an action upon an indenture by which the father and the infant bind themselves that the latter shall serve the defendant for four years, and the master, on his part, covenants that he will, during that time, teach and maintain the infant. That is an absolute covenant on his part. Whether there are any other covenants on the part of the father and son does not appear upon this record. Covenants of this nature are not precedent and dependant, but mutual and independant. If the apprentice refuses to perform his covenants, the master has a right to claim compensation against the father for any damage sustained thereby; so if the master does not do his duty, he is also liable to an action at the suit of the father. In answer to the breach of covenant now declared upon, the master relies upon three different pleas. The first is in substance, that the apprentice was guilty of disobedience, and had absented, and wholly withdrawn himself from the service of his master, accompanied with a declaration that he never intended to return. Now, if the apprentice had continued absent from the period of time in the plea mentioned, down to the end of the term, of course neither his father nor himself could have maintained any action. The second and third pleas do not carry the case in any respect farther than the first. The replication is, that after the son had been guilty of the acts of disobedience stated, the son had voluntarily returned, and tendered and offered himself to serve and obey the defendant during the residue of the term, but the defendant refused to receive him. I have had some doubt whether the replication ought not to have alleged that the offer to return was within a reasonable space of time, so as to throw upon the defendant the obliga-

tion of taking the apprentice back again, but no difficulty in that respect has been pressed in argument, and I am inclined to think, that if the defendant meant to contend that there had been an unreasonable interval between the period when the apprentice departed, and that when he offered to return, it should have been by way of rejoinder. Now, does disobedience of orders, or do any of the other acts mentioned in the pleas, entitle the master to put an end to the contract? I think not. These are the acts of an infant. No consent on his part to put an end to the contract will be valid for that purpose. His consent will not be sufficient. If the apprentice has been guilty of disobedience of orders, temporary absence without leave, or other acts of misconduct, these are matters for which provision might have been made by covenants entered into at the time the indenture was executed. There is no case which says that the master, for such conduct, shall be entitled to put an end to the contract. Agreeing that we are at liberty to construe this contract independently of the statutes concerning apprentices, still I think the existence of those statutes evidently shews, that without the provisions therein contained, the parties could not of their own act dissolve such a contract. Upon the whole, it appears to me that mere misconduct on the part of the apprentice, does not entitle the master at once to put an end to the indentures. One or two nisi prius cases have been pressed upon our consideration, but those refer to the ordinary relation of master and servant, which differs very materially from the case of master and apprentice. In general a premium is given with an apprentice to the master, in consideration of teaching and maintaining him during the term stipulated. But in the ordinary relation of master and servant there is a condition implied from the very nature of the contract, that if no definite period is fixed, it is to continue until there shall be a reasonable notice given, provided the party shall so long behave himself well. Such a condition is most reasonable,

1823.
WINSTONE v. LINN.

because the contract is to be a contract of service, and of service only, moving from the servant to the master. It would be most unjust to cast on the master the obligation of continuing under his roof, and paying wages to, a servant, who will not continue to perform that duty which the master has stipulated that he shall perform. That, however, is not the case of a mutual and independent contract, such as an indenture of apprenticeship; and for these reasons it appears to me that these pleas are bad, and consequently that the plaintiff is entitled to judgment.

HOLROYD, J.—I am of the same opinion. The objections taken to the technical form of the pleadings in this case have been fully answered by my Brother *Bayley*, and I agree fully in the reasons he has offered why they are not tenable. As to the general question, it appears to me, that the cases which have been cited with reference to the contract between master and servant, are not applicable to the present case. In contracts of that nature the servant is to perform his service, in consideration of which the master is to maintain and pay him wages. The performance of service in a due and proper manner is the consideration and the sole consideration for the master maintaining and paying him wages; and the moment he ceases to perform this obligation, the consideration fails. If he misconducts himself he may be discharged, and the master may refuse to pay him his wages if he does not earn them. The case of master and apprentice is different. That is not a case where certain duties are to be performed by the servant, for which a compensation is to be paid by the master. An indenture of apprenticeship is a contract for the instruction of a young person in a trade or business—a person who is to be protected against his own improvident acts, not being sui juris, and over whom the master has a higher control than over a servant. The case of master and apprentice therefore stands upon a very different footing; and at the

same time it is to be observed, that when an apprentice is placed out, a premium is usually paid to the master for instruction. Here a premium of 90*l.* was paid with the apprentice. The master on his part enters into a covenant to instruct or cause him to be instructed. On the part of the master, that it is also a covenant for protection during the period of the apprenticeship; it gives him a right of control over the youth, in order that his instruction may be effectual. The argument urged on behalf of the defendant, if effect were given to it, would leave the apprentice wholly unprotected, and the moment he was bound, would leave him at liberty to do what he pleased, notwithstanding the indentures. I do not mean to say that the father might not be responsible for any breach of covenant to be performed by his son, but that the indenture is to be void for his misconduct, is a proposition which I think cannot be maintained. The misconduct of the apprentice in not obeying the lawful commands of the master cannot itself be considered as putting an end to the indentures, and unless it is to have that effect by releasing the master from his covenants, the present action is clearly maintainable. The statute of *Elizabeth* applies, I think, very strongly in argument upon the present occasion. I admit that this case is to be considered in the same way as if that act had not been passed; but it goes to shew, that notwithstanding any misconduct on the one side or on the other, covenants of this description are good in point of law; and if so, they are good for the purpose of maintaining this action. The provisions of that statute enable the master or the apprentice to complain before a magistrate for misbehaviour, or any cause of complaint, on the one side or the other, and authority is given to the magistrate to vacate the indenture if he thinks proper. That authority so vested in the magistrate shews what the idea of the legislature was in passing that statute, namely, that misconduct on the one side or on the other, stated generally, would not put an end to the

1823.
WINSTONE
v.
LINN.

indentures. I am therefore of opinion, that this action is maintainable.

BEST, J.—The objection taken on the ground of a departure has been fully answered by my Brother *Bayley*. From the great gravity with which the argument upon the general question was put, and the zeal with which it was enforced, I was alarmed lest we should be compelled to pronounce one of the most unjust judgments ever given in a court of justice. What is this case? An indenture of apprenticeship has been entered into, upon the execution of which the master has received a premium of 90*l*. The apprentice goes under his master's protection. There is bad conduct on the part of the apprentice stated and not denied. That bad conduct terminates in the apprentice going away from his master's house on the 10th of *July*, and remaining absent two days; and on the 13th he returns again, and offers to continue in the service and conduct himself dutifully. It is argued that the apprentice having improperly conducted himself, and having gone away with a declaration that he would not return, he was from that moment put out of the protection of his master, and ceased to have any claim upon him for any portion of the 90*l*., or to have any right to call upon him for any further instruction. If that were law, it would be the most unjust law ever propounded in a court of justice; but that is not the case. If the apprentice misconducts himself, the master has a remedy against the father in an action of covenant upon the indenture, and may recover a compensation in damages for any injury he has received; but the misconduct of the apprentice is not to be considered a dissolution of the contract. I agree with my Brother *Holroyd*, that if the argument which has been urged in this case be right, there would be no occasion for the jurisdiction which the legislature has vested in magistrates and chamberlains upon such subjects. I think the strongest argument is to be drawn

from the jurisdiction thus given to magistrates, that the misconduct of the apprentice is not of itself sufficient to dissolve such a contract, because all this care of the legislature upon the subject would have been unnecessary, if by an act of imprudence on the part of the apprentice his indentures were to become void. What would be the consequence of sanctioning the argument which has been urged in this case? If an absence of three days would be sufficient to vacate the indentures, an absence of a single hour would be sufficient; and if a boy of fifteen years of age is guilty of a single act of misconduct, the master would have a right to turn him away; and although the parents should pay with him a fee of 500*l.*, the master would have a right to keep the whole. To hold such a doctrine as that would produce the grossest injustice. But it is said in this case that the absence of the boy prevented the master from teaching him. If the boy had been so long away that the master could not teach him, and an action were brought against the master, then he would have good reason for saying, "I would have taught your son, but he absented himself so long, and so misconducted himself, that it was impossible for me to do my duty." In such a case as that the master would have a good defence to the action; but that is not the present case. Here the absence was no more than two or three days out of four years. The master was bound, unless he was released by the magistrates, to take the apprentice back, and if he continued to misconduct himself, to endeavour to reclaim him, and to enforce upon him the necessity of acting more properly during the remainder of his time, in order that he might supply the want of that instruction which he had lost on account of previous disobedience to his orders. This is the case of a contract by deed, not put an end to by either of the parties, and that circumstance distinguishes the case from the authorities which have been cited, where the party pleads in excuse non-performance of the duty required to be performed by

1823.
WINSTONE
v.
LINN.

the party who complains. Here the defendant has not been prevented from doing his duty, and therefore he is bound to take the apprentice back and perform his covenants.

Judgment for the plaintiff.

DOE, d. PLAYER v. NICHOLLS.

A testator devises his freehold and copyhold lands to trustees, in trust, for his infant son, and directs "the same to be *transferred* to him as soon as he shall attain to twenty-one years; but in case he should die before he attains to the age of twenty-one years, then I give to my cousin *W. P.*, his heirs and assigns, all my freehold and copyhold lands, &c."— Held, that the trustees did not take a fee by this devise, but only an estate for years, determinable upon the son's attaining twenty-one years.

EJECTMENT for certain copyhold premises in the parish of *Aldenham*, in the county of *Herts*, the principal part of which were held of the manor of *Aldenham*, and the remainder of the manor of *Titburst* and *Kendalls*, in *Aldenham*. The lessor of the plaintiff claimed as heir of his father, *Thomas Gregory Player*, deceased, who was the only child and heir at law of *Perry Player*, Esq. deceased. At the trial, before *Wood*, B., at the *Summer* Assizes, 1821, for *Hertfordshire*, a verdict was found for the lessor of the plaintiff, subject to the opinion of the Court, upon a special case, the material parts of which were these :—

Perry Player, the grandfather of the lessor of the plaintiff, being seised of considerable freehold and copyhold estates, and being also possessed of large personal property, died in the month of *November*, 1785, after making his will, dated 6th *October*, 1784, which was executed to pass real estates. After giving certain legacies, and amongst others an annuity of 20*l.* to *Ann Lowe* for her life, as well as the sum of 50*l*; he made the following bequests and devises :—

"*Item*, I give to *William Reade* and *William May*, of the Custom-house, *London*, Gentlemen, fifty guineas each, and do appoint them, together with the aforementioned *Ann Lowe*, guardians of my son, *Thomas Gregory Player*. *Item*, I give to the said *William Reade*, *William May*, and *Ann Lowe*, in trust, for my only son *Thomas Gregory*

Player, all the rest and residue of all my goods and chattels, and also my freehold and copyhold lands, which I have surrendered to the use of my will. Likewise all my leasehold and lifehold estates, situate, lying, and being in the different counties of *Hertford*, *Middlesex*, *Kent*, and *Sussex*, and all other my effects of what kind or nature soever; *the same to be transferred to him as soon as he shall attain to twenty-one years;* but in case he should die before he attains to the age of twenty-one years, then I give to my cousin, *William Player*, his heirs and assigns, all my freehold and copyhold lands, and the tithes thereof, lying at *Aldenham*, in the county of *Hertford*."

The will then went on to make several specific bequests of other parts of his property to different objects of his bounty, concluding by nominating and constituting *William Reade*, *William May*, and *Ann Lowe*, his executors and trustees. The testator died without altering or revoking his will, leaving *Thomas Gregory Player* his only surviving child; and his will was proved in the Prerogative Court of the Archbishop of *Canterbury*, on the 12th *November*, 1785, by *Ann Lowe* only, the two other executors having first renounced. At a Court, held for the manor of *Aldenham*, on the 16th *January*, 1786, it was presented by the homage that *Perry Player* had died seised of the copyhold premises in question, held of that manor. At another Court, held on the 4th *December*, 1786, *Ann Lowe* was, on the said presentment, admitted to the premises, to hold them to herself, upon the trusts of the will, at the will of the lord. *Ann Lowe* died in *July*, 1794, leaving *William Reade* and *William May*, her surviving. *Thomas Gregory Player* attained the age of twenty-one years on the 24th *October*, 1793, and at a Court, held on 20th *October*, 1794, being during the lives of *William Reade* and *William May*, he was admitted to the premises, on a presentment that *Ann Lowe* was dead, and that he had attained the age of twenty-one years, to hold the same to him, his heirs and assigns, for ever. *Wil-*

1823.
PLAYER v. NICHOLLS.

liam Reade died in *January*, 1801, and *William May* died in *May*, 1809, leaving his great-nephew, *William May Lander*, who is now living, and an infant of the age of eighteen years, or thereabouts, his heir at law. No surrender or release from *William Reade*, *William May*, and *Ann Lowe*, or either of them, or from the heir of either of them, to *Thomas Gregory Player*, is recorded on the Court Rolls of the said manor either before or since his admission. *Thomas Gregory Player* was in possession of the premises, by receiving the rents and profits thereof from the time of his admission in *October*, 1794, to the time of his death, but he never made any surrender thereof to the uses of his will, or for any other purpose whatsoever. On the 19th *March*, 1818, *Thomas Gregory Player* made his last will, executed to pass real estates, by which he bequeathed all his real and personal estates of every description whatsoever to his wife, *Isabella Player*, her heirs, executors, administrators, and assigns, and to be at her and their absolute and uncontrolled disposal. On the 24th *March*, 1818, *Thomas Gregory Player* died without altering or revoking his will, leaving his wife, his eldest son and heir, (the lessor of the plaintiff) then of the age of twenty-two years, and two other children surviving him; and letters of administration, with his will annexed, were granted to Mrs. *Player*, on the 7th *April*, 1818, by the Prerogative Court of the Archbishop of *Canterbury*. At the time of *Thomas Gregory Player* making his will, and at the time of his death, he was seised of or beneficially entitled to the inheritance in possession of certain freehold estates. Mrs. *Player* received the rents and profits both of the freehold and copyhold premises in the parish of *Aldenham*, from the death of her husband to her own death. At a Court, holden for the manor of *Aldenham*, on the 7th *December*, 1818, she exhibited her late husband's will, which was presented and recorded; and at the same Court she tendered herself to be admitted, but a dispute arising as to the description and



quantities of the land comprised in one of the copyhold estates, and the fines payable for her admission, no admittance took place, and she died on the 16th July, 1820, without having been admitted.

As to the copyhold estate, held of the manor of *Titburst* and *Kendalls*, the case stated, that *Perry Player* had purchased this tenement in 1781, of one *William Oxton*, who had in *September*, in the same year, surrendered the same out of court, into the hands of the lord, to the use of *Perry Player*, who died without having been admitted thereto. After his death, at a Court, held 28th *November*, 1785, the surrender was presented, and *Thomas Gregory Player*, then an infant, aged about thirteen years, was admitted under it, to hold to him, his heirs and assigns, for ever. *William Oxton*, the surrenderor, was then living, and did not die until *February*, 1798, and left lawful heirs, him surviving, who are now living, and neither he nor his heirs ever made any further surrender or release of the said copyhold tenement. *Isabella Player* received the rents and profits of this tenement from the death of her husband to her own death; and at a Court holden 22d *May*, 1820, she applied to be admitted, but a difference arising between her attorney and the steward as to the amount of the fine, no admission took place, and she died without having been admitted.

As to both the copyhold estates, the case further stated, that *Isabella Player* made her will on the 2d *March*, 1819, executed to pass real estates, by which, after reciting the will of her husband, she devised all his freehold and leasehold estates to trustees, in trust, to sell the same, and empowered them to sell all such copyhold estates as should be vested in her at the time of her death; and as to the money to arise by such sales, and all other monies which should become vested in the said trustees, the testatrix declared they should stand possessed thereof upon certain trusts, for the benefit of her three children, in such shares, and in such manner as was therein expressed and declared. *Isabella Player* left the lessor of the plaintiff, and her two other chil-

1823.

PLAYER v. NICHOLLS.

dren, her surviving. At a Court, holden for the manor of *Aldenham*, on the 16th *May*, 1821, the lessor of the plaintiff was admitted tenant to all the copyhold premises holden of that manor to which *Perry Player* was admitted, except so far as the same might have been varied by the award of the commissioners under the *Aldenham* inclosure act, 41 *Geo.* 3, and also to the inclosure allotments, as eldest son and heir of *Thomas Gregory Player*, deceased, to hold the same to him, and his heirs and assigns for ever. At a Court, holden for the manor of *Titburst* and *Kendalls*, on the 11th *June*, 1821, the lessor of the plaintiff was also admitted tenant, as eldest son and heir of *Thomas Gregory Player*, deceased, to the tenement and inclosure allotment held of that manor, to hold the same to him, his heirs and assigns, for ever.

Upon this case the argument was confined solely to the copyhold estate held of the manor of *Aldenham*, and the question which the defendant's counsel stated his intention to argue was, whether, by the will of *Perry Player*, a legal estate in fee passed to his trustees, or only an estate for years; for if only the latter, he admitted that the lessor of the plaintiff was entitled to judgment.

Rayley, for the lessor of the plaintiff. The question upon which this case now depends is, whether by the devise contained in *Perry Player*'s will, until *Thomas Gregory Player* attained the age of twenty-one, the trustees took a fee. It is obvious, from the language of the devise, that they only took an estate for eight years, or until the testator's son became of age. This construction is borne out by the current of decisions in the Courts of Common Law, the Court of Chancery, and the House of Lords. In this will there are no words of inheritance to the trustees; it is merely a devise to them of the estate until the son becomes twenty-one, and when that period arrives, all interest in them is devested. No reason can be suggested why they

should take an estate in fee. The purposes of the trust certainly did not require that they should take such an estate, and unless this can be demonstrated, it is clear that nothing could vest in the trustees, or their heirs, after the minor became of age. The case finds that one of the three trustees was admitted to the copyhold estate, that the other two renounced, and that the heir at law of one of the trustees is now living. It is to be contended, on the other side, that upon the true construction of this will, the trustees took the fee, and consequently that the fee is now outstanding in the heir at law of the surviving trustee. This proposition is to be supported by shewing that the admission of one joint tenant is the admission of all, and therefore that the admission of *Ann Lowe* will operate as the admission of *William May Lander*, the heir at law of the last surviving trustee. Without disputing the proposition that the admission of one joint tenant is the admission of all, it is only necessary to look a little more closely to the language of the devise, in order to see whether the trustees can by any construction be considered as taking the legal fee, for if that proposition fails, the rest of the argument falls to the ground. By the devise, the testator confers no benefit whatever upon the trustees; he creates no trust for the payment of debts, nor for the performance of any acts or things after the minor shall have attained the age of twenty-one. There is no possible purpose for which they could take a continuing estate after that event. It is merely a devise to them in trust until the son is of age, and when that time arrives, the estate became absolutely vested in him. The very language of the will shews that they were only to take the estate for a limited period, because as soon as the son attains twenty-one, it is to be "transferred," which means no more than that it is to be "delivered up" to him. No effect can be given to the words "the same to be *transferred* to him as soon as he shall attain to twenty-one years," because these words do not import any

1823.

PLAYER v. NICHOLLS.

thing like a continuing trust. The trustees are not then required to do any act, because by operation of law the estate becomes absolutely vested in the heir, who, notwithstanding the will, would take by descent, which is paramount to all other titles. The operation of the facts of this case is precisely that which is stated by Mr. *Fearne*, in his Essay on Contingent Remainders, *401, namely, "Where one devised lands to his wife, till his son should come to his age of twenty-one years, and then that the son should have the land to him and his heirs; and if he should die without issue before his said age, then to his daughter; this was held a good executory devise to the daughter. In which case it is observable, that the first devise of the fee was to the son, who was the heir; and therefore, under the doctrine of *Boraston*'s case (*a*), the son taking the vested fee, would still have taken by descent, and not by the devise, so that the immediate fee must be considered as undisposed of by the will." And *Palmer*, 132. 1 *Eq. Abr.* 188, and *Thrustout* v. *Denny* (*b*), are cited. That is precisely this case. Here the first devise of the fee is to the son, who is the heir; and though he takes the vested fee, still he would take by descent. It cannot be supposed that the testator intended to disinherit his son, but supposing any question of that kind should arise, still there is so much doubt upon the case that the Court would construe the will most favourably for the heir, upon the principle that the heir is not to be disinherited upon presumption. In the present case it is quite immaterial for what term the trustees took, whether it was for eight or ten years. Whatever the term is, their interest is at an end when it expires, and no sensible effect can be given to the words, "the same to be transferred," because when the son attained twenty-one, the particular interest was at an end, and the heir was entitled to take possession. *The Bishop of Bath*'s case (*c*), *Boraston*'s case (*d*), and *Goodtitle*

(*a*) 3 Rep. 19.
(*b*) 1 Wils. 270.
(*c*) 6 Rep. 34.
(*d*) 3 Ibid. 19.

1823.

PLAYER v. NICHOLLS.

v. *Whitby* (*a*). But independently of these express authorities for this part of the argument, there are several cases which establish, that if there be a devise to trustees, without limiting the quantum of their interest, they will only take such an estate as is necessary for the purpose of executing the trusts of the will. *Doe* v. *Barthrop* (*b*), and *Doe* v. *Simpson* (*c*). Here the only trust was to hold the estate until the son came of age, and when that event occurred the trust was absolutely at an end.

The Court interposed, and called upon

Abraham, for the defendant, who contended, first, that by the will of *Perry Player*, a legal estate was created in the trustees; and, second, that the admittance of *Ann Lowe*, being in law the admittance of all the trustees, and as no surrender or release of the copyhold from them, or either of them, or the heir of the survivor of them, was recorded on the court rolls of the manor, the legal estate was now outstanding in *William May Lander*, the infant heir of *William May*, the surviving trustee, and consequently ejectment would not lie. Upon the first point, he insisted, that as the trust of the will was to *transfer* the estate to *Thomas Gregory Player*, this was such a trust as would give the trustees the legal estate. Although copyholds were not within the operation of the statute of Uses, still decisions which had taken place upon that statute, would assist the Court in construing the present case. A class of cases in the time, of Lord *Hardwicke* (*d*), had decided, that where there is something to be done by the trustees, they take the legal estate, until that which they are required to do has been effected. Now, here it was obvious that the trustees had something to do, because they were required to *transfer* the estate to *Thomas Gregory Player* as soon as he attained

(*a*) 1 Burr. 228.
(*b*) 5 Taunt. 382.
(*c*) 5 East, 162.
(*d*) *Garth* v. *Baldwin and others*, 2 Ves. 646.

1823.
PLAYER v. NICHOLLS.

the age of twenty-one, and consequently as no transfer, according to the forms required by law, had taken place, the estate must still be considered as outstanding in the heir at law of the surviving trustee. Then, secondly, the admission of Mrs. *Lowe* must be considered as the admission of all the trustees. For this *Roe* v. *Hutton* (a), was an authority giving the rule in such cases. That rule had been adopted in Mr. *Watkins*'s Treatise on Copyholds (b), where it is laid down that the admission of one joint-tenant is the admission of all. If it were conceded that in this case the tenancy of the trustees was joint, it followed, from these authorities, that the admission of Mrs. *Lowe* would be the admission of the other trustees; and the result would be, that though two of the trustees had renounced the trust, yet the heir of the survivor, who was now alive, would take the legal fee, which, being now outstanding, the plaintiff could not recover. He cited *Sacheverell* v. *Froggatt* (c), *Purefoy* v. *Rogers* (d), and *Marshall* v. *Hill* (e).

BAYLEY, J.—In this case our attention is confined to the copyhold estate held of the manor of *Aldenham* only; for, as to the other copyhold estate, no question is raised, it being perfectly clear that the heir-at-law is for the present entitled to that part of the property. Whether the will of *Isabella Player*, his mother, may operate to defeat his title to that portion of the estate, it is unnecessary for the Court to give any opinion. The sole question for our consideration is, the construction which is to be put upon the will of *Perry Player*, as it affects the copyhold in *Aldenham*. By that will the testator devises to *Ann Lowe*, *William Reade*, and *William May*, his freehold and copyhold lands, which he had surrendered to the use of his will, and also all his leasehold and lifehold estates, situate in different counties,

(a) 2 Wils. 162.
(b) 2 Watk. 277.
(c) 2 Saund. 361.
(d) S. B. 380.
(e) 2 M. & S. 608.

1823.

PLAYER v. NICHOLLS.

and all other his effects, of what kind or nature soever, in trust, for his only son *Thomas Gregory Player*, "the same to be transferred to him as soon as he shall attain to twenty-one years of age." It is quite clear that copyholds are not within the statute of Uses; but admitting that the gift of this estate to these trustees, in trust, for the testator's only son *Thomas Gregory Player*, would vest for a period the legal estate in them, we are to see for what period that legal estate is to endure. I take it to be a settled rule, in the construction of wills, that the estate conveyed to a trustee is to continue for so long a period only as is necessary to effect the purposes of the trust. That was laid down in *Doe* v. *Barthrop* (*a*), and *Doe* v. *Simpson* (*b*); and therefore the question is, what estate it is necessary there should be in the trustees to effect the purpose of the will. The estate is to be held in trust for the son, and to be transferred to him when he shall attain the age of twenty-one years. How is a copyhold estate to be transferred? It is by surrendering the interest to the person in whom the interest is remaining, and suffering that person to be admitted on the court-rolls as the tenant. If an estate in fee be given to trustees, then it might be necessary to make an actual surrender, in order that the fee should pass; but if it is only limited to them until the object of the bounty should attain the age of twenty one, and, when that period arrives, he claims to be admitted, and is admitted, he has the complete legal ownership, without any formal transfer. In this case it is not necessary for the purposes of the trust, that *Thomas Gregory Player* should take any *interest* whatever from the trustees, although the word used is "transferred," because I consider the law as putting an end to their interest when he came of age; and then being admitted as tenant of the manor, that is sufficient to satisfy the words of the will, which require the estate to be transferred to him. Even in cases where there is an express limitation to trustees

(*a*) 5 Taunt. 382.

(*b*) 5 East, 162.

"and their heirs," the limitation is for a definite period, and a definite period only; and therefore an estate to trustees, in terms limited to them and their heirs, will cease as soon as the purposes of the trust are at an end. I am therefore of opinion that it was not necessary for the purpose of this trust, that these trustees should take a greater interest than until *Thomas Gregory Player* should attain the age of twenty-one. In the class of cases to which we have been referred by the defendant's counsel, the trust is *to pay the rents and profits.* There is in such cases a continuing purpose to be answered, and therefore it is necessary for the trustees to have a continuing interest in the property; but here it was not at all necessary for the purpose of the trust, that the trustees should have an interest beyond the period when *Thomas Gregory Player* had attained full age. If they had taken a fee, I should have thought, under the circumstances of this case, that we were at liberty to have presumed an extinguishment of all their claim to the estate, and that they considered *Thomas Gregory Player* as having had a legal interest in the estate from the year 1794, when he was admitted. It is stated that the admission of *Ann Lowe* operated as an admission of all the trustees. I have no difficulty in saying that the admission of one may be the admission of all, but I do not think it necessary that all the trustees should have been admitted, because no useful purpose could have been answered. As far as the interest of the trustees was concerned, the admission should have been confined to one and one only, because the quantum of fine would depend upon the number to be admitted. In 1794, when *Ann Lowe* died, neither her heir-at-law nor the surviving trustees made any claim to the estate; and indeed it would have been against their interests so to have done, because it would have answered no other purpose than to create an expence upon the estate. In *October*, 1793, *Thomas Gregory Player* had attained the age of twenty-one. He was then entitled to have a legal

estate vested in him. In *July*, 1794, he is the only person admitted, and he only is found on the court-rolls. At that time there might be four candidates, each claiming admission, namely, the two surviving trustees, the heir-at-law of *Ann Lowe*, and *Thomas Gregory Player*, the person beneficially interested. Why, then, if the heir-at-law of *Ann Lowe* and the surviving trustees make no claim to have themselves admitted, but suffer *Thomas Gregory Player* to be admitted, I think they have no right afterwards to say, that the legal estate was not vested in him by that admittance. He stands on the court-rolls as legal tenant to the lord. A person having an equitable interest only is not to be admitted on the rolls, and has no right to say that the lord is to have him as his tenant when the right of admittance is in the legal tenant only. From 1794 down to 1818 *Thomas Gregory Player* stands upon the rolls as the legal tenant, and he has the actual possession of the property. I am of opinion, therefore, that at the time when he made his will, he must be considered as having the legal estate, even if the estate of the trustees had not ceased in 1794, because by reason of his adverse possession from that time down to 1818, he would have had a new legal estate. Being complete owner of the property at the time his will was made, the estate could not be outstanding in the heir-at-law of *Ann Lowe*, or in the surviving trustees; and consequently the lessor of the plaintiff is entitled to recover.

HOLROYD, J.—I am of the same opinion. It is contended that the trustees, under the will of *Perry Player*, took an estate in fee, but I think it is extremely clear, from the terms of that will, that they took a trust estate only until *Thomas Gregory Player*, the son, should attain the age of twenty-one years, determinable upon his death in the mean time, and that they took no greater estate. There are no words in the will which carry the estate in themselves beyond the time in which the trust was to be performed,

1823.
PLAYER v. NICHOLLS.

and it is clear, upon the face of the will, that the death of *Thomas Gregory Player*, before he attained twenty-one, was not to give them any longer estate than for the performance of the trust, because I think it is obvious that the son was himself to have the estate when he was of age, and that the trustees were to take only during his minority. The rule of law clearly established, by several of the late cases, shews, that the estate to trustees, even where there are words of inheritance used, shall continue in the trustees no longer than is necessary for the performance of the trust; but, in this case, the estate is given to the trustees nominativé, without any words of inheritance. This is simply a trust estate to them, and not an estate in fee; and consequently their trust is at an end as soon as the son comes of age. Then it is urged, that as the estate is to be transferred by the trustees as soon as the son attains twenty-one, it follows, as a consequence, that they must be considered as taking an estate in fee, in order to enable them to do that act. Nothing, however, is expressed on the face of the will which would give them an estate in fee, assuming the transfer to be an act to be done by the trustees. The estate in question consists of copyhold lands, and we are to consider the effect of the words "to be transferred." Copyhold lands may be transferred without a surrender. I do not mean to say that the legal estate in a copyhold can be transferred without a surrender, when it is in any other person than a devisee under a will; but I consider these words, "the same to be transferred to him as soon as he shall attain to twenty-one years of age," as meaning no more than that the land shall be delivered up to him by the trustees when he shall arrive at that age. It is clear that the trustees are to hold the land in trust for him until he comes of age, and there is no estate given to them, except during the interval of infancy. I am therefore of opinion, that the heir-at-law of *Perry Player* is entitled to recover these lands.

BEST, J.—I am of opinion that the trustees took no legal estate whatever, but that the estate, immediately upon the death of the testator, descended to his son. The devise is of copyhold lands, and the trustees are to hold until the son arrives at twenty-one years of age, and, when he attains that age, the lands are to be transferred to him; that is, he is to have the occupation, to which he would be entitled by operation of law, as the eldest son, if no will had been made. This is the most reasonable construction to be put upon this will, because if the devise conveyed the legal estate to the trustees, the estate in that short period of time might be burthened with the admission of all the trustees, and, when the son came of age, be further burthened by the expence of his own admission. The trustees, it is true, were vested with the enjoyment of the estate during the minority of the son, but in the mean time the legal estate was in him notwithstanding the will, and he would have taken by descent. That, I think, is clearly proved by the cases which have been referred to in the argument for the plaintiff, and more particularly by those mentioned in *Fearne*'s Essay on Contingent Remainders, 401. These trustees took only an interest in the term, but the legal estate remained in the son. Suppose the trustees took a legal estate, still, according to the authorities referred to by my Brother *Bayley*, they would only take so much of a legal estate as was necessary to effect their trust. Here the trust was at an end the moment the son came to the age of twenty-one; and therefore when that period arrived, the estate devested, and went directly to him. But assuming that the trustees took an estate of inheritance, which I think they did not, and admitting that the possession of the cestui que trust is to be considered the possession of the trustees, and consequently that the statute of Limitations would not operate, however long the cestui que trust might hold the estate, so as to bar the right of entry by the trustees, still it appears to me, that the right of entry by the trustees

1823.

PLAYER v. NICHOLLS.

would, in this case, be gone, because the moment this young man became twenty-one, he was himself admitted. He asserted his claim to the legal estate, and no longer held as cestui que trust, but exercised an adverse claim to the continuance of the trust, and from that moment the statute of Limitations operated so as to take away the right of entry from the trustees. Now, although a trustee in equity has a right to the estate of which he is trustee, yet it must be such a right as that he is entitled to assert it by entry. If the right of entry is gone, he cannot set up an equitable estate to defeat a legal vested estate. Here the right of entry was gone from the period which has elapsed from the year 1793 until the bringing of this action. Upon these grounds, I am of opinion that the lessor of the plaintiff is entitled to judgment.

BAYLEY, J., added, that there were other words in the will which clearly shewed that the testator never meant the trustees to take the fee, namely, "but in case he (*T. G. Player*) should die before he attains to the age of twenty-one years, then I give to my cousin *William Player*, his heirs and assigns, all my freehold and copyhold lands," &c.

Postea to the plaintiff.

LINGARD and another, Assignees of FRY, a Bankrupt, *v.* MESSITER.

Where a judgment creditor purchased by bill of sale from the sheriff certain machinery, seized in execution, belonging to his debtor, and after marking the same with the initials of his name, allowed the debtor to retain possession, upon his agreeing to pay a rent for the use of it, and the latter remained in possession until he committed an act of bankruptcy:— Held, that as the change of ownership was not notorious, the assignees were entitled to recover the property in trover, under the 21 *Jac.* 1. c. 19. s. 11.

TROVER for certain machinery and goods, the property of the bankrupt. Plea, Not Guilty, and issue thereon. At the trial, before *Richardson*, J., at the *Somersetshire Lent* Assizes, 1822, the case proved in evidence was this:— In the year 1815, the bankrupt, a manufacturing clothier in *Somersetshire*, being in difficulties, and indebted to the defendant, a banker at *Frome*, gave him two warrants of attorney, to secure 1000*l*., upon which, in *September* in that year, judgments were entered up by the defendant, and the bankrupt's machinery taken in execution thereon. The sheriff kept possession till the 27th of *October* following, when the defendant took the goods by a bill of sale, to which the sheriff and the bankrupt were both parties. On the 2d of *November* following, the defendant granted to the bankrupt a lease of the machinery for one year, at 10*l*. per month, and the machinery then remained in the exclusive possession of the bankrupt, the defendant's initials *N. M.* having been previously marked upon it. At the end of that year a new agreement was made between the defendant and the bankrupt, and indorsed upon the lease, for another year, upon the same terms, except that the bankrupt was to be at liberty to repurchase the machinery at 40*l*. per month. Under this second lease the bankrupt remained in the sole and undisputed possession of the machinery down to the time of his committing an act of bankruptcy, by absconding in *September* 1818; in *November* following the defendant seized and sold the machinery, and in *September* 1819, a docket was struck against the bankrupt, and he was subsequently declared a bankrupt. The title of the plaintiffs to sue as assignees being proved, the only

1823.

LINGARD v. MESSITER.

question left to the Jury was, whether at the time the act of bankruptcy was committed, the goods were in the possession of the bankrupt, as reputed owner, within the meaning of the statute 21 *Jac.* 1. c. 19. s. 11; and being of opinion that the reputed ownership was never in fact out of the bankrupt, they, under the learned Judge's direction, found a verdict for the plaintiffs.

Gaselee, in *Easter* Term last, having obtained a rule to shew cause why that verdict should not be set aside, and a new trial had,

Selwyn now shewed cause. There is no ground for disturbing this verdict, which is fully supported both by the facts of the case and by the bankrupt laws. The bankrupt was the original owner, and it was notorious to all the world that he was so; that gives the plaintiffs a primâ facie title to the goods, and if any circumstances have subsequently occurred, which have notoriously changed the ownership, and vested it in the defendant, it was his duty, and a necessary part of his case, to have produced evidence to that effect. The fact of the defendant's initials having been stamped on the machinery at the time of the first lease to the bankrupt, makes no difference as to the question of notoriety, because of itself it proves nothing, unless it was notorious. It has been decided, in a case very similar to the present, that such an act is not sufficient evidence of notoriety to change the ownership, where the possession still continues in the bankrupt, *Knowles* v. *Horsfall* (a), and upon this plain principle, that though the initials might speak a language intelligible to the parties themselves, it was to all the rest of mankind perfectly unintelligible, and therefore carried no degree of notoriety with it. The case of *Thackthwaite* v. *Cock* (b) did not turn upon the merits, but upon the custom of the trade. Undoubtedly the custom of a trade may sometimes

(a) 5 B. & A. 134. (b) 3 Taunt. 487.

have an effect upon questions of this nature, but then it must, as *Mansfield*, C. J. expressed himself in that case, be "clearly proved, and must be such a custom that persons dealing with the traders may see and know that the goods may possibly not be the property of the possessor." Here both these qualifications are wanting, for there was no custom proved at the trial, and if there had been, it would not be such a custom as would enable the world to see and know that the possessor was not in fact the owner of the machinery. Again, the execution levied on the machinery by the defendant in the year 1815, can have no weight in the case; for, supposing the sale by the sheriff to have been a matter sufficiently notorious as to the change of property, still there was a subsequent restoration of the goods to the bankrupt, and possession by him, so notorious as to do away the conclusion to be drawn from the fact of a sale, and to lead the world to believe that the bankrupt had re-acquired the entire property in the machinery. In *Bryson* v. *Wylie* (*a*), and *Lingham* v. *Biggs* (*b*), this point was very fully considered, and those cases must govern the present. He also cited *Horne* v. *Baker* (*c*), and *Muller* v. *Moss* (*d*).

Gaselee, in support of the rule, submitted, that as the question raised upon the fact of the bankrupt's possession was a matter of surprise on the defendant at the trial, and as the verdict seemed evidently to have been against the weight of evidence on that point, the Court would think the subject deserved a more deliberate inquiry, and would give the defendant the benefit of a new trial on payment of costs. Independently, however, of this ground, he contended, on the authority of *Kidd* v. *Rawlinson* (*e*), that the sale by the sheriff to the defendant, accompained by the fact of the machinery being marked with the initials of the latter, was

(*a*) 1 Bos. & Pul. 83.
(*b*) Ibid. 82.
(*c*) 9 East, 215.
(*d*) 1 M. & S. 335.
(*e*) 2 Bos. & Pul. 59.

1823.

LINGARD v. MESSITER.

sufficient evidence of property, and of notoriety, to distinguish this from the other cases cited, and entitle the defendant to a new trial.

Per Curiam.—We are not at liberty to disturb this verdict. The question left to the Jury was, whether the possession of the machinery continued in the bankrupt as reputed owner down to the time of his bankruptcy, and they found in the affirmative; and it seems to us that the facts proved in evidence warranted that conclusion. This being machinery used in the business of a working manufacturer, possession certainly does not necessarily imply ownership, because the articles in question are such as may be hired from time to time for the purposes of trade; but if a man be proved to have been once the owner of such property, and he is allowed to continue in possession, the ownership must fairly be presumed to continue, unless there is something to shew that the change of ownership had notoriously ceased. If an execution is sent in against the goods of a judgment debtor, and there is a sale by the sheriff, and the vendee thinks proper to allow the debtor to remain in possession, it is his duty to take care to make it notorious that the old ownership has ceased, though the possession remains unchanged. In such a case the notoriety of the change will protect the property against the operation of the statute of *James;* but if the vendee suffers the possession to remain the same without making the change of ownership notorious, the reputed ownership will continue as before, and the statute will attach. The fact of a sale, not generally known, will not vary the question as to who has the reputed ownership. According to the case of *Lingham* v. *Biggs*, the words "order and disposition" are synonymous with "reputed ownership;" and if the reputed ownership continues down to the time of the bankruptcy, the bankrupt is to be considered the owner. Whether there be a reputed ownership or not, may be a question of fact for the Jury,

and, generally speaking, it is; but if an original ownership be proved, and also a possession in the bankrupt down to the time of his bankruptcy, there will be no question for the Jury as to the ownership. A defendant who is to contend that ownership does not result from a continuance in possession, must not only shew an actual change of ownership, but also that the ownership is *notoriously* changed. Here there was no evidence of notoriety, and therefore the question was properly left to the Jury, and we think the verdict ought not to be disturbed. It is suggested that this was not the point intended to be tried, and therefore that the defendant was surprised by the evidence upon the question of possession; but there is no affidavit in support of that ground for a new trial, and we must presume that the defendant was prepared to meet every part of the case.

Rule discharged.

BIDDELL v. LEEDER and PULHAM.

An agreement inter partes for the sale of the share of a vessel, with a present interest therein, though the purchase money is to be paid, with interest, at a future time, is void within the 26 *Geo.* 3. c. 60. s. 17. and the 34 *Geo.* 3. c. 68. s. 14. for not reciting therein the certificate of the ship's registry.

SPECIAL assumpsit upon an agreement for purchase and sale of one-sixteenth share of a vessel called the *Venus*. At the trial before *Richardson*, J., at the last Summer Assizes for the county of *Suffolk*, the plaintiff had a verdict, with 466*l.* damages, subject to the opinion of the Court upon the following case:—

The plaintiff being the owner of one-sixteenth share of a certain brig, belonging to the port of *Woodbridge*, then lying in the river *Orwell*, out of the port of *Woodbridge*, entered into an agreement with the defendants in these terms:—"Agreement made this 9th of *January*, 1816, between *Robert Leeder*, of *Woodbridge*, merchant, and *James Pulham*, of the same place, gentleman, of the one part;

1823.

BIDDELL v. LEEDER.

and *Arthur Biddell*, of *Playford*, farmer, of the other part. The said *Arthur Biddell* doth hereby agree to sell, and the said *Robert Leeder* and *James Pulham* do hereby agree to buy, one-sixteenth part or share of all that brig or vessel called the *Venus*, of the burthen of 146 tons or thereabouts, and also one-sixteenth part or share of all and singular the anchors, cables, ropes, masts, sails, yards, boats, oars, arms, ammunition, apparel, and furniture whatsoever, to the said brig or vessel belonging, or in any wise appertaining; which brig or vessel is now lying in the river *Orwell*, and belongs to the port of *Woodbridge*, whereof *John Thompson* is or was master; for the price or sum of 35*l.*, to be paid by the joint note of hand of the said *Robert Leeder* and *James Pulham* to the said *Arthur Biddell* this day twelve months, with lawful interest thereon. In consideration of which said sale, the said *Robert Leeder* and *James Pulham* do hereby agree to guarantee and exonerate the said *Arthur Biddell* from the payment of every bill, and every sort of expence, that the said *Arthur Biddell* is now liable to pay, or may hereafter be liable to pay, for or on account of his said sixteenth part or share of and in the said brig or vessel, save and except the expences already incurred for putting the said brig or vessel into the commons, and detaining her in the said river *Orwell*, which expences are to be jointly paid by the said *Arthur Biddell* and *Robert Leeder* to the said *James Pulham*. And for the consideration aforesaid the said *Arthur Biddell* doth agree to convey, at the expence of the said *Robert Leeder* and *James Pulham*, to the said *Robert Leeder* or *James Pulham* the said sixteenth part or share of and in the said brig or vessel, and of and in her anchors, cables, ropes, masts, sails, yards, boats, oars, apparel, and furniture, when he the said *Arthur Biddell* shall be thereunto requested, according to the rules and regulations required by law for the transfer of shares of and in ships or vessels, which rules and regulations the said *Robert Leeder* and *James Pulham* do and each of them doth agree



to abide by and conform to, as soon as the said transfer shall be made to them or either of them by the said *Arthur Biddell*; and the said *Arthur Biddell* doth agree that the said *Robert Leeder* and *James Pulham* shall have the earnings of the said vessel, according to the said sixteenth share, up to the day of the date hereof. In witness whereof, &c." Signed and witnessed. Some time in the month of *February* following, the plaintiff executed a bill of sale to the defendant *Pulham* only, which was accepted by him. On the trial, the plaintiff proved a notice to the defendants to produce the bill of sale, which was not produced. No parol evidence was given to shew whether the certificate of registry was recited in the bill of sale, or not. If the Court are of opinion that the agreement was void because the certificate of registry was not recited in it, judgment of nonsuit is to be entered; otherwise the verdict is to stand.

H. C. Robinson for the plaintiff. The question for the opinion of the Court depends upon the construction of 26 *Geo.* 3. c. 60. s. 17, and 34 *Geo.* 3. c. 68. s. 14, the latter of which recites, and has for its object to explain and amend the former. By 26 *Geo.* 3, it is enacted, that in every transfer of a vessel, "the certificate of the registry shall be truly and accurately recited in the bill or other instrument of sale thereof, and that otherwise such bill of sale *shall be utterly null and void to all intents and purposes.*" The 34 Geo. 3, declares, "that no transfer, contract, or agreement for transfer of property in any vessel, made or intended to be made, *shall be valid or effectual for any purpose whatsoever, either in law or equity*, unless such transfer, &c. shall be made by bill of sale, or instrument in writing, containing such recital as prescribed by the said recited act." The only object which the Legislature could reasonably have in view in passing these acts, was, that every bill of sale should contain the certificate of registry, and the Court will, if possible, give effect to that object. This may easily be

1823.

BIDDELL v. LEEDER.

done by inserting the particle "so" in the second clause before the words "made or intended to be made," and then the enactment will at once express that which it evidently means, that agreements "so made," that is, *made by bill of sale*, shall recite the certificate. It never could be intended that a mere executory agreement such as the present, made between private individuals, should recite the certificate, because it has no connection with the public and essential part of the transaction. Upon this principle all articles of partnership might be held void, or would at least be rendered perfectly unintelligible. But even admitting that the agreement was not valid in law, still was not the plaintiff compellable to execute the bill of sale? And, whether compellable or not, still having executed, and the defendant having accepted it, is not the latter bound to pay the purchase money? None of the cases on this subject militate against this proposition. This case is distinguishable from *Brewster* v. *Clarke* (*a*), because there the instrument expressly purported to be a bill of sale, but not being in compliance with the provisions of the statute, it was held void. Here the instrument is merely executory, and the parties at the time do not affect to give it the character of a bill of sale. The Court will look at all the instruments as so many parts of a whole, and will take them together as making up one conveyance. This principle is laid down with reference to leases in the case of *Ferrers* v. *Fermor* (*b*), and seems to apply quite as forcibly to these instruments. It is true that when the bill of sale was executed, the defendant, by relation back, became entitled to the ship's earnings from the date of the agreement; but surely the bill of sale may be void without the prior agreement being void also. The agreement per se was not an instrument of conveyance, and it is clearly to instruments of conveyance only that these

(*a*) 2 Meriv. 75. See *Mestaer* v. *Gillespie*, 11 Ves. 625. 642. *Speldt* v. *Lechmere*, 13 Ves. 588; and *Thompson* v. *Smith*, 1 Madd. 399.

(*b*) Cro. Jac. 643.

statutes are meant to apply. The case of *Kerrison* v. *Cole* (a) is an express authority for this position, where the whole Court were of opinion that the 26 *Geo.* 3. applied only to so much of the instrument as related to the conveyance of the property in ships. The position is also supported by the case of *Ex parte Yallop* (b), where the Lord Chancellor, in emphatic terms, declares the policy of both the statutes to be confined to such instruments as actually pass the property. But there is an important variation in the language of the latter from that of the former statute. In the first, the bill of sale is declared to be "utterly null and void;" in the second, the transfer is said to be "not valid or effectual." It is no where declared that it shall be void; nor even if it were so stated, would the Court, under these circumstances, construe that word strictly; they would adopt the rule of construction which has governed the Court in considering questions upon the statute relating to apprentices (c), and would take it to mean *voidable*, and not absolutely and in the first instance *void*. If the agreement were not followed by any actual deed of conveyance, it would in this view of the case be voidable; but here there is an instrument of conveyance following the agreement. Upon this principle, and considering that the Court has authority to put a liberal construction upon these acts of parliament in favour of the real justice of the case, the plaintiff is clearly entitled to judgment. He cited *Stradling* v. *Morgan* (d).

Dover, for the defendants. It seems to be admitted on the other side, that if the agreement was such as gave an immediate interest in the vessel to the defendant, it was within the operation of the statute, and void. Now it is perfectly plain from the language of this instrument, that

(a) 8 East, 231.
(b) 15 Ves. 60.
(c) 5 Eliz. c. 4.
(d) Plowd. Rep. 199.

1823.

BIDDELL v. LEEDER.

it does pass an immediate interest in the vessel. The words are, "doth hereby agree to sell." These are words of actual and present sale; there is a certain specified sum of money to be paid in consideration of that sale, and though made payable at a future date, it is to carry interest from the day of the date of the agreement. The defendants are to receive all the byegone earnings of the vessel, and they are to defray all the byegone expences incurred; in short, no instrument can contain more decisive characters of actual and immediate transfer of interest and property in the thing sold and bought. But the facts of the case are quite decisive. The plaintiff, at the trial, proved a notice to the defendants to produce the bill of sale. It was not however produced, nor did the plaintiff bring forward any other evidence to shew that its contents were such as the law required. In the absence of such evidence, how could the Jury presume then, or how can the Court presume now, that it did contain the necessary recital? Under such circumstances the onus probandi lay upon the plaintiff; such evidence was necessary to the support of his case, and he was bound to produce it. *Cooper* v. *Gibbons* (a). The case of *Kerrison* v. *Cole* is, if properly considered, an authority strongly against the plaintiff. A portion of the instrument in that case was held not to be within the avoiding operation of the statute; but that was upon the ground that it was an independent and collateral covenant. But can it be said that the agreement in this case is an independent and collateral covenant distinct from the bill of sale? Certainly not; it is a part of it, and dependent upon it; and therefore if the bill of sale is void, the agreement, as a matter of necessary consequence, is void also. There can be no doubt that a bill of sale, which does not recite the certificate of registry, is void; the statutes expressly declare it so; and *Kerrison* v. *Cole* is a decision in point. The bill of sale here must be taken to be deficient in this requi-

(a) 3 Camp. 363.

site, and is therefore void; and as the agreement is dependent upon it, that is void also.

The Court stopt him, and proceeded to give judgment.

BAYLEY, J.—The object of the legislature in passing the Register Acts is perfectly plain, namely, that it should be notorious who had the interest, the actual legal interest, and who had any thing whatever to do with the ownership of *British* ships from time to time, and that there should be no secret transfer of that species of property from one hand to another. The 26 *Geo.* 3. c. 60. first provided that the certificate of registry should be recited in every bill of sale. It was then suggested, that, in consequence of the terms in which that statute was worded, vessels might be transferred without any bill of sale or written instrument of any kind; and in order to prevent that mischief, and to set at rest all doubts upon the subject, the 34 *Geo.* 3. c. 68. was passed, which imposed the same requisite upon all contracts and agreements for the transfer of vessels. The language of this last statute appears to me sufficiently ample to include every species of agreement for the sale or transfer of a vessel, and sufficiently plain to supersede all doubt or difficulty in its construction. It is argued that the present case is not within this statute, because it does not declare that an agreement, which does not recite the certificate, shall be *void*. The word "void" is certainly not in the statute; but it does declare such an agreement to be *not valid or effectual either in law or equity*; and I confess that I am unable to see any distinction between the two expressions. I think that an instrument which is not "valid in law or equity" is "void to all intents and purposes." It would be quite inconsistent with any sound rule of construction for us to insert into the second statute the word "so," especially as the effect of that insertion would be to defeat the object which the legislature had in view, namely, to extend the law to

1823.

BIDDELL v. LEEDER.

every species of contract for the transfer of vessels. It is very important to the furtherance of that object, that it should be made notorious who has not only the legal, but also the equitable interest in the ship; who fits her out; who appoints the captain; and who is entitled to her earnings. Such an agreement as the present, if held to be valid, would tend to keep the public in ignorance on all those points, and would have a prejudicial effect upon the public interest. If it be necessary, in order to bring an agreement within the operation of this statute, that it should convey a present interest, this agreement certainly possesses that character. The purchase money bears interest from the date of the agreement, and is therefore the same as a sum immediately paid down; the consideration of the agreement is a selling and buying; it alludes, in direct terms, to an actual transfer, by speaking of it as "the said sale;" it includes a guaranty to the seller against past and future expences on account of the ship, and imposes those expences on the purchasers, to whom it also secures the past and future earnings. It is, in my opinion, in every sense of the word, an agreement for the sale of the ship within the meaning of the statutes, and therefore, as it does not recite the certificate of registry, I am perfectly satisfied that it is void to all intents and purposes. I think, therefore, that judgment of nonsuit must be entered in this case.

HOLROYD, J.—I am of the same opinion. The agreement seems to me to be clearly void for not reciting the certificate of the ship's register. The object of these statutes was to obtain a full disclosure of all the parties in any way beneficially interested in the vessel, and we are bound to construe them so as give that object effect. Such an agreement as the present, construed in any other way, would completely defeat the object in view, because it would operate as an immediate transfer of the property in the ship from the owner to other parties, without notifying or dis-

closing who those parties were. This instrument plainly shews, that it is an agreement for an immediate and actual sale, and it has been decided both with respect to instruments of this nature, and with respect to leases also, that such an agreement is in law a sale.

BEST, J.—I am of the same opinion, though I acknowledge that I have had considerable difficulty in bringing my mind to that conclusion. It appears to me, that this is not a very honest defence to the plaintiff's demand, but the interests of individuals must occasionally be sacrificed to what is considered public policy. Whether public policy is really advanced by these enactments it is no part of our province to inquire; we are to interpret the meaning, not discuss the wisdom of the law. I think it quite clear that these statutes were intended to include *all* contracts for the transfer of vessels, immediate and future, and therefore I consider this contract as coming fully within their operation. I think no part of the contract is "valid either in law or equity." The bill of sale is admitted to be void, and where the principal contract fails, all the subordinate covenants must fail with it. That is a plain and well-known principle, and is founded no less in common sense than in sound law. We may lament the effect produced by the administration of the law in particular cases, but we cannot suffer our regret to interfere with our duty, or to lead us from the strict application of the law as declared by the legislature.

Judgment for the defendants.

BODENHAM *v.* PRITCHARD, Widow.

Testator in 1814, after devising to his wife for life the mansion in which he then lived, with all the buildings and lands thereunto belonging, as then enjoyed by him, with all the appurtenances, devised as follows:—"And from and after her decease, then I give and devise all my said mansion called *D. with all the buildings and lands thereunto belonging, as now enjoyed by me, with all the appurtenances,* unto my godson *J. S. B.*, his heirs and assigns for ever." Testator had purchased the estate called *D.* in 1772, and in 1792 purchased an adjoining estate called *U. H.*, and in two years afterwards took several closes, forming the latter into his own occupation, and, after removing the fences, continued to occupy the same until the time of his death; the additional closes having, in the interim, been always known by the name of the "*D.* meadows:"—Held, that under the devise the additional closes passed to the godson.

TROVER for timber trees. Plea, Not Guilty. At the trial before *Park*, J., at the *Herefordshire Lent* Assizes, 1821, the plaintiff had a verdict for the damages laid in the declaration, subject to the opinion of the Court, upon the following case:—

The plaintiff is devisee under the will of the late *John Pritchard*, of *Dolyvellin*, in the county of *Radnor*, Esq., and the defendant is his widow. By his will, dated 16th *September*, 1814, Mr. *Pritchard* devised as follows:—"I give and devise all and every part of my real estates of which I shall die possessed, of every nature and kind whatsoever and wheresoever thereunto belonging, with all and every their appurtenances, unto *Francis Bodenham*, of, &c., gentleman, and *Charles Meredith*, of, &c., attorney-at-law, to hold to them, their heirs and assigns, to and for the several uses, intents, and purposes hereinafter limited, expressed, and declared, of and concerning the same, to the intent and purpose that the said *F. B.* and *C. M.* do permit and suffer my wife *Elizabeth Pritchard*, to have, hold, and enjoy all and singular my mansion house in which I now live, called *Dolyvellin*, in the several parishes of, &c., with all the buildings and lands thereunto belonging, as now enjoyed by me, with all the appurtenances, for and during the term of her natural life, and from and after her decease, then I give and devise all my said mansion house, called *Dolyvellin, with all the buildings and lands thereunto belonging, as now enjoyed by me, with all the appurtenances,* unto my godson *John Shearwood Bodenham* (the plaintiff), son of, &c., and

1823.



BODENHAM v. PRITCHARD.

his heirs and assigns for ever; and as to all the rest of my real estates, of which I may die possessed, I give and devise the same, and every part thereof, unto my said wife *E. P.*, her heirs and assigns for ever; she my said wife paying and discharging all the several annuities or yearly rent charges out of the same; and also she, my said wife, paying and discharging all the several legacies hereinafter mentioned out of the said estates, if my personal estate should prove insufficient." The testator died in *September*, 1814, and the defendant as tenant for life became possessed of the premises devised to her as above stated, and is still in possession. The testator purchased the *Dolyvellin* estate in 1772, which he occupied to the time of his death, and in 1792 he purchased the *Upper Hall* estate close adjoining, and about two years afterwards he took several pieces of land called *Dolyvellin Meadow, Lower Dolyvellin Meadow, The Ox Pasture,* and *The Red Wood*, all of which had formed part of the *Upper Hall Farm*, into his own possession, and continued to occupy them with the *Dolyvellin* estate to the time of his death. The fences between the *Dolyvellin* estate and the *Upper Hall* estate were removed, but there never was nor is now any fence between the former and the *Red Wood*. The rest of the *Upper Hall Farm* was let or leased to other tenants to the time of the testator's death. The estate so occupied by the testator was called *Dolyvellin*, after the addition of the part of the *Upper Hall Farm*, the same as before; and a witness for the defendant, who had known the premises fifty years, stated at the trial, that he never understood *Dolyvellin* as comprehending more lately than it had done originally. The meadows were called *Dolyvellin Meadows* when they belonged to the *Upper Hall* estate, and they are so called to this time. Since the testator's death the defendant has cut down and converted a quantity of timber growing partly on the old *Dolyvellin* estate, and partly on the several pieces mentioned, as having been originally part of the *Upper Hall*

1823.

BODENHAM v. PRITCHARD.

estate, and occupied since 1792 by the testator as described. The question for the opinion of the Court is, whether, under the devise to the plaintiff, the pieces of land so taken from the *Upper Hall* estate passed to him or not; if the Court shall be of opinion that they did pass to him, a verdict to be entered for the amount of *all* the timber felled; otherwise a verdict to be entered for the amount of the timber felled on the old *Dolyvellin* estate only.

Puller, for the plaintiff, contended, that under this devise both the *Dolyvellin* estate and the part of the *Upper Hall* estate, occupied with it, had passed to the plaintiff as reversioner in fee, and consequently, as the defendant was only tenant for life, the former was entitled to maintain trover against her for *all* the timber she had cut upon either of the estates. The devise was of "all my said mansion house called *Dolyvellin*, with all the buildings and lands thereunto belonging, *as now enjoyed by me*, with all the appurtenances." The *Dolyvellin* estate and the part of the *Upper Hall* estate were then enjoyed by the testator *as a whole*, and therefore it was clear from the words "as now enjoyed by me," and their connection, that he meant to describe the pieces lately added to *Dolyvellin*, as "thereunto belonging," and as "appurtenances" thereto. This was the natural meaning of the words, and the only reasonable construction of the sentence, and upon this view of the case the plaintiff was entitled to a verdict for the whole amount claimed.

Campbell, for the defendant. It seems manifest from the language of this will that none of the lands belonging to the *Upper Hall* estate were intended to pass to the plaintiff, but only those which originally and exclusively belonged to the mansion house of *Dolyvellin*. The devise is of "my *mansion house* called *Dolyvellin*, with the land *thereunto belonging*;" and it is clear therefore that the testator intended to confine the bequest to that mansion house and its original

appurtenances, and not to include lands which never did belong or appertain to it. The rule of construction in such cases is, that where there is property to satisfy the strict terms of the devise, the Court will not seek to extend their operation by giving them a more liberal interpretation. In this case the lands originally belonging to the *Dolyvellin* mansion house, were perfectly adequate to satisfy the words of the devise, and therefore the Court will not give a larger sense to the words, and a more extended design to the testator. What is the fair meaning of the words "as now enjoyed by me," except as now, or as always, enjoyed by me *as the Dolyvellin estate?* The lands belonging to the *Upper Hall* estate never were so enjoyed; they were indeed occupied by the testator, but that occupation could not change their name, their identity, or their relative situation and character; and if the word "enjoyed" is to be extended to these lands, it might also be extended to every acre of land the testator possessed. Then does the word "appurtenances" assist the argument on the other side? Certainly not; it can refer only to the lands which had been always known and enjoyed *as the Dolyvellin estate*, and cannot extend the devise beyond the plain and strict sense of the words. But then it is said that the testator occupied this portion of the newly-purchased estate with the old *Dolyvellin* estate, and removed certain fences which had previously separated the one from the other. These facts are certainly found in the case, but what is their effect? Merely to shew that the testator did intend to unite the two estates for the purposes of his own occupation, but not at all that he intended to annex the one to the other, in order to constitute one estate. Upon the whole, therefore, as there is land to satisfy the devise without including these fields, the Court will adopt the plainest mode of construction, and will not extend the devise to any more than is evidently comprehended by the terms, namely, the original *Dolyvellin* estate.

1823.

Puller, in reply, was stopt by the Court.

BODENHAM *v.* PRITCHARD.

BAYLEY, J.—I agree, that in construing a will, the intention of the testator must appear clear and indubitable, before we can give a particular and extended effect to words of doubtful or ambiguous import, and I think that rule presents no difficulty in the present case, for I am of opinion, that the testator's intention was clearly to devise to his godson *all* the land that he enjoyed at the time when he made his will. The case finds, that the testator was the owner of both estates, having many years lived on *Dolyvellin*, and having in 1792 purchased *Upper Hall*. The latter adjoined the former, and shortly after this purchase the testator removed the fences which had separated the two, took this portion of the *Upper Hall* into his own occupation, and continued to occupy it with, and as part of, *Dolyvellin*, up to the time of his death, a period of more than 20 years. During this occupation he made the devise in question, and what is the fair, plain, rational sense of the words he has adopted? He devises "the *Dolyvellin* mansion-house, with all the lands, &c. *thereunto belonging*." If he had stopped there, I should have entertained some doubt whether he intended to include the *Upper Hall* fields, because "belonging" might perhaps be fairly construed to mean *in point of law and title belonging*. But he goes on and adds, "as now enjoyed by me." How was *Dolyvellin* enjoyed by him? In joint occupation, and in unity with the *Upper Hall* fields, as one undivided estate, and the only rational view of this devise is, that he intended to give to his godson as one estate, that which he had made so by his own act and deed, and which he had enjoyed as such for a term of 20 years. In this devise there are two media of demonstrating its meaning, the phrases "thereunto belonging," and "as now enjoyed by me." Both of these need not clearly include the land in dispute, either of them would be sufficient; but I think both do include it; that the latter explains and

illustrates the former, and that the meaning which results from both is, that the *Upper Hall* fields do *belong to Dolyvellin*, because they were *enjoyed with it*. For these reasons I am of opinion, that these disputed closes were comprehended in the devise to the plaintiff, and consequently that he is entitled to all the timber growing upon them, and a verdict must be entered for him for the full damages claimed.

HOLROYD, J.—I am of the same opinion. It is clear, that under this will, all the land which passed to the wife for life, will pass also at her death to the plaintiff in fee, and I have no doubt that the *Upper Hall* closes were meant to be a part of that devise. They had been for many years occupied and enjoyed with *Dolyvellin*, and therefore in common parlance, and according to the general acceptation of the words, they belonged to it.

BEST, J.—I shall always hold, that no lands pass by a will, unless it appears upon the face of the will in express, precise, and unambiguous language, that it was the intention of the testator they should pass; but there is no danger of infringing that rule in the present case, for the testator's intention to pass *all* the lands, seems to me too clear to be doubted. All that is devised to the widow for life is clearly devised also to the plaintiff as reversioner in fee. The two estates were occupied and enjoyed together as one for many years, and upon what principle can we divide and sever what the testator by such unequivocal acts, and for so long a period, has pronounced to be united? The words "as now enjoyed by me," convey to my mind a direct and unquestionable meaning, and in my opinion constitute as express a devise of the whole estate as words can possibly convey. The words "thereunto belonging" are equally unambiguous, for these closes did in fact belong to *Dolyvellin*, and formed a part of it. The removal of the fences, the addition of

1823.

BODENHAM v. PRITCHARD.

the closes to the mansion, the joint occupation of both, are acts so unequivocal, that I see no room for any doubt upon this point, and the adoption of the word "now" is peculiarly striking, as shewing that the testator meant to devise *Dolyvellin*, not in its original state, but in its new and enlarged form of occupation.

Judgment for the plaintiff.

DOE, on the demise of NEWBY *v.* JACKSON.

A. enters into an agreement with *B.* to sell land then in the possession of the latter, on certain terms, and to execute a conveyance in case *A.* should be found owner thereof, and could make a good title thereto, and agrees, that in the mean time *B.* shall remain in possession. *A.* afterwards brings ejectment against *B.* to try the title, but not having demanded possession, or otherwise determined *B.*'s tenancy: Held, that the action was not maintainable.

Where a feme sole, after marriage, was admitted tenant of a manor in the north of *England*, of certain premises to her and her heirs, as of her own tenant-right, according to the custom, and afterwards the lord executed a conveyance of the same premises to the husband in fee, and enfranchised the same from all seignory rights to which they were previously liable. *Semble*, that this conveyance after the death of the husband, had the effect of giving the wife an absolute estate in fee-simple in the premises, descendible only upon the heirs ex parte maternâ.

EJECTMENT for the undivided third part of three closes of land in the parish of *Millom*, in the county of *Cumberland*, the demise being laid on the 1st of *February*, 1816. At the trial before *Bayley*, J. at the *Summer* Assizes for *Cumberland*, 1819, the plaintiff was nonsuited, with liberty to move to set aside the nonsuit, and enter a verdict for the plaintiff, and upon the motion being made for a rule nisi for that purpose, the Court directed the facts to be stated for their opinion on a case.

The premises, for an undivided third part of which this ejectment was brought, are three closes of land called *Close*, *Mire*, and *Benridding*, otherwise *Bennett Ridding*. The two former are parts of a tenement called *Upper Water Blean*, situate within the parish of *Millom*, which tenement, as well as the close called *Bennett Ridding*, until the making of the deed after mentioned, had been from time immemorial within and parcel of the manor or lordship of

Millom, and customary tenements descendible, and which had descended from ancestor to heir, as of the hereditary right of the tenant, called tenant-right, and holden of the lord of the manor for the time being, by right and services according to the custom. At a court holden for the manor on the 8th *June*, 1738, *Ann*, the wife of *Joseph Hunter*, formerly *Ann Leece*, spinster, was admitted to her and her heirs according to the custom, to the premises in question. By indenture of 2d *February*, 1741, made between *Andrew Hudleston*, Esq. *Richard Hudleston*, and *Edmond Gibson*, of the first part, *Joseph Hunter*, of the second part, and *William Hudleston*, of the third, reciting, that by an act passed in the last session of Parliament, intituled, "An act for vesting certain manors, lands, and tenements of the said *William Hudleston*, in trustees, to be sold for the payment of his debts," the several messuages, lands, and tenements, rents, fines, heriots, boons, dues, duties, and services, and other the premises thereinafter mentioned, to be purchased by the said *Joseph Hunter*, were, amongst other things, vested in the said *A. H.*, *R. H.*, and *E. G.*, and their heirs in trust, to be sold for the several uses and purposes therein above and in the said act mentioned, and that the said *Joseph Hunter* stood possessed and seised to him and his heirs according to the custom of tenant-right, time out of mind used and observed within the manor of *Millom*, of and in one customary messuage or tenement at *Cross House* therein particularly mentioned, and that *Ann* his wife was also possessed and seised to her and her heirs according to the custom of tenant-right, time out of mind used and observed within the said manor, of one other customary messuage or tenement called *Upper Water Blean*, in the parish of *Millom*, and holden of the said *William Hudleston*, as parcel of his manor, by payment of the yearly customary rent of 6*s*. 4*d*. and other fines, &c. and also of one parcel of customary land called *Bennett Ridding*, also situate in the parish of *Millom*, and holden of the said manor by payment

1823.

Doe
v.
Jackson.

of the customary rent of 8*d.* and also other the rents, &c.; and further reciting, that the said *Joseph Hunter,* for the sum of 90*l.* had contracted with the said trustees and *William Hudleston,* for the purchase of the freehold and seigniory as well of the said messuage and tenement of which he was himself seised, as also of the produce of the freehold and inheritance of the other messuage and tenement of which his wife was seised: It was witnessed by the indenture, that the trustees, with the consent of *William Hudleston,* in pursuance of the said contract, and in consideration of the said sum of 90*l.* did grant, bargain, sell, alien, enfeoff, and confirm unto *Joseph Hunter,* his heirs and assigns, all the said messuage or tenements and parcel of land then in the tenure of himself and his wife, as customary tenants thereof, or his farmers or undertenants of the same, with their, and every of their appurtenances, and the freehold and inheritance thereof, and all commons, &c. with all that their, and every of their estate, right, title, interest, possession, freehold, reversion, &c. of, in, or to the said premises above granted, and of, in, and to every part and parcel thereof, with the appurtenances, saving to the said *William Hudleston,* his heirs and assigns, lords of the said manor, as thereafter was particularly saved: To have and to hold the said messuages and tenements and parcel of land, except as thereinafter excepted, unto the said *Joseph Hunter,* his heirs and assigns, to the only proper use and behoof of the said *Joseph Hunter,* his heirs and assigns for ever, in fee-farm, according to the course of common law, absolutely freed and discharged of and from all customary and other rents, fines, &c. whatsoever, thereafter to become due and payable to the said *William Hudleston,* his heirs or assigns, lords of the said manor of *Millom,* or otherwise, yielding and paying therefore to the said *William Hudleston,* his heirs or assigns, the rent of one pepper-corn, on the 29th *September* yearly, if lawfully demanded, and doing and performing suit of court at the several courts leet, courts

baron, and customary courts of the said *William Hudleston*, his heirs and assigns, to be holden for the said manor, and saving out of the said grant unto the said *William Hudleston*, his heirs and assigns, lords of the said manor, all mines of copper, lead, tin, iron, and coal, and all other mines and minerals whatsoever, not therein and thereby particularly granted and conveyed, then open, or at any time or times thereafter to be open or discovered, within the said thereby granted premises, or any part thereof, with full and free liberty to search for the same, as therein mentioned, saving also, excepting and reserving to the said *William Hudleston*, his heirs and assigns, lords of the said manor, all royalties, wreck of the sea, waifs, and also all that rent commonly called ffell or forest meall. There was a covenant in the deed from the trustees to *Joseph Hunter*, his heirs and assigns, for quiet enjoyment by him and his heirs and assigns, a covenant against incumbrances from them or by their means, and a covenant for further assurance by them at any time within seven years. The deed then stated that *William Hudleston* ratified and confirmed the grant and conveyance of the said tenements, and covenanted with *Joseph Hunter*, his heirs and assigns, for quiet enjoyment, free from incumbrances by him or any person claiming the premises, and for further assurance. The deed lastly contained a power of attorney from the trustees to a person therein named, to give livery of seisin to *Joseph Hunter*, which was afterwards given, and a memorandum thereof indorsed upon the deed. *Joseph Hunter* died seised of such estate as he took under the said deed, if any, on the 27th *March*, 1762, leaving his widow *Ann* him surviving, who died in the year 1776, leaving two sons, of whom *William Hunter* was the elder, her surviving. The said *William Hunter* entered upon the premises, but the precise time of his entry was not proved at the trial, and continued in possession until the 6th *February*, 1800, when he died in possession and in seisin thereof, if the court shall be of opinion that his father had been seised,

without leaving any issue, but having first, by his last will and testament in writing duly executed, devised the premises in question to his wife for life, and after her decease to one *William Wylde* in fee. Upon the death of *William Hunter*, his widow entered upon and enjoyed the premises until her death in 1815. *William Wylde*, the devisee named in the will, died in the life-time of the testator. At the time of the death of *William Hunter*'s widow, and also at the time of the demise laid in the ejectment, the lessor of the plaintiff was one of the co-heirs at law ex parte paternâ, but not ex parte maternâ, of one undivided third part of the said tenements. *The defendant was put into possession of the premises by *John Wylde*, who was the eldest son of *William Wylde* the devisee, and which said *John Wylde* was also heir ex parte maternâ to the late *William Hunter*. By agreement in writing entered into on the 3d *May*, 1819, being before the service of the declaration in ejectment in this cause, between the lessor of the plaintiff, of the one part, and the defendant of the other, the plaintiff agreed to sell, and the defendant agreed to purchase, in case the said plaintiff should be found the owner thereof, the closes of land called *Ben Ridding*, *Close Mire*, *Great Meadow*, and *Long Meadow*, situate in the parish of *Millom*, in the county of *Cumberland*, late the property of *William Hunter*; and the plaintiff and defendant thereby respectively agreed, that the purchase-money for the same closes, or so many and such parts thereof as should be the property of the plaintiff, should be fixed and ascertained by two indifferent persons, one to be chosen by each party, and if such two persons should not agree, then the purchase-money to be fixed by a third, or indifferent person, to be chosen by the first two, and his valuation to be final and conclusive between the parties. And the said *James Jackson* agreed to pay the purchase-money for so much and such part (if any) of the above premises as the said *John Newby* could give a good and sufficient title in the law to, at *Christmas* then

next, with interest for the same in the mean time, at the rate of 4*l.* 5*s.* per cent. per annum; and *John Newby* agreed to grant, sell, and convey the said closes, or such part thereof as he could give a good and sufficient title in the law, to the said *James Jackson*, his heirs and assigns, or as he or they might appoint, upon payment, or sufficient security given for payment, of the purchase-money of the said premises, to be fixed and ascertained as aforesaid, the said *James Jackson* "to have possession from the time of the date of the agreement." The premises mentioned in the declaration, one undivided third part of which is sought to be recovered in this action, are part of the premises mentioned in the above agreement. At the time of entering into the same, the defendant was in possession of the disputed premises, and remained in possession until and after the service of the declaration. No demand of possession of the premises sought to be recovered in this action, was ever made on the defendant, nor was any notice given to him to quit the same. The question for the opinion of the Court is, whether the lessor of the plaintiff is entitled to recover. If the Court shall be of that opinion, a verdict to be entered for the plaintiff, if not, then a nonsuit to be entered.

The points raised in argument were, first, whether the agreement set out in the case, having been executed since the demise laid in the declaration, and no demand of possession having been made, the lessor of the plaintiff could maintain ejectment; and second, whether, supposing him not out of Court on this ground, the lessor of the plaintiff, being heir ex parte paternâ, had a better right to the property than the defendant, who claimed as heir ex parte maternâ.

Tindal, for the lessor of the plaintiff, contended, upon the first point, that the Court ought not to construe the agreement too strictly, but give it a liberal construction so

1823.
DOE
v.
JACKSON.

as to effect the obvious intention of the parties, which was no more than that the defendant agreed to purchase the land and pay a certain price, if it should turn out that the lessor of the plaintiff could make a title to it, the defendant in the mean time to retain possession. Under such circumstances there was no other mode of determining the question of title but by bringing an ejectment. The Court must look to the sense in which the parties understood their own agreement, and not tie the plaintiff down to the ordinary rules by which the action of ejectment was governed. Here the fact of bringing the ejectment was sufficient notice to the defendant, and there was no occasion to demand possession in any other manner. This case was distinguishable from *Right* v. *Beard* (*a*), because by the very terms of the agreement in this case, the defendant was only to retain possession, subject to the determination of the question of title. Having therefore only a conditional possession, the case was taken out of the general rule. Supposing the agreement could be considered as a release of the action, the Court could not, according to *Doe* v. *Draper* (*a*), give effect to it for that purpose. In that case the defendant pleaded a release from the lessor of the plaintiff, subsequent to the commencement of the action, but the Court said, they could not look to any act done by the lessor of the plaintiff, but must consider *John Doe* as the real plaintiff. Admitting that the agreement could be considered as creating a tenancy at will, still, after its execution, the service of the declaration would be sufficient notice of the determination of the will, to maintain the action. This, however, was a mere technical objection, and there being a real question to be tried between the parties, the Court would hardly put the lessor of the plaintiff to the expence of bringing another action in order to raise it.

The Court interposed, and said, they would hear the real

(*a*) 13 East, 210. (*b*) 4 M. & S. 300.

question; and it being understood that the defendant would abide by the decision of the Court upon that point,

Tindal then contended, that the lessor of the plaintiff, being heir ex parte paternâ, had a better title to the property than the defendant, who was only heir ex parte maternâ. The property in question undoubtedly came into the family ex parte maternâ, and unless it could be shewn that the descent on that side had been interrupted, it would descend to the heirs of *Ann*, the wife of *Joseph Hunter*; but he insisted, that the deed of bargain and sale executed by the lord to *Joseph Hunter* "and his heirs," had the effect upon his death of uniting in his eldest son the customary estate, and also the fee-simple of inheritance carved out by the act of the lord. One of two consequences must follow from the deed of enfeoffment, either to extinguish the customary estate, or to suspend the wife's tenant right during the life of her husband. In either way of considering the case, the two estates would, quacunque via data, unite in the eldest son, and descend to the heirs ex parte paternâ. In arguing this proposition he cited *Wynne* v. *Cookes* (*a*), *Anonymous* (*b*), *Roe* v. *Briggs* (*c*), *Selby* v. *Alston* (*d*), *Co. Litt.* 351 *a.*, *Lane*'s case (*e*), *French*'s case (*f*), and *Challoner* v. *Marshall* (*g*).

Littledale, contrà, as to the first point, relied upon *Right* v. *Beard* as an express authority for shewing that the lessor of the plaintiff was in no condition to maintain ejectment, inasmuch as he had done nothing to determine the defendant's tenancy under the agreement before action brought (*h*). [*The Court* said this point was clearly with him.] Upon the second, he contended, that the estate in question descended

(*a*) 1 Bro. C. C. 515.
(*b*) Cro. Eliz. 7.
(*c*) 16 East, 406.
(*d*) 3 Ves. 339.
(*e*) 2 Co. 17.
(*f*) 1 Co. 31.
(*g*) 2 Ves. jun. 524.
(*h*) See *Goodtitle* v. *Herbert*, 4 T. R. 680; and *Doe* v. *Wilson*, 11 East, 56.

1823.

Doe v. Jackson.

upon the heirs ex parte maternâ. In the first place, the property was originally in *Ann Leece*, as of tenant right, and then, upon her marriage with *Joseph Hunter*, she was admitted to her and her heirs, according to the custom of the manor. This certainly would be such a seisin in her husband in her right, as to constitute him tenant by the custom, and he would be capable of taking an enfeoffment of the seignory rights, conveyed by the deed of 1741, executed by the lord. The only effect which could be given to that deed was to enfranchise the customary estate from the seignory rights to which it was previously subject. It did not devest the wife of her estate as of tenant right; it merely gave her a higher estate, and, upon her husband's death, she would take an absolute fee-simple, descendible upon her heirs. The deed, undoubtedly, purported to be an enfeoffment to the husband and " his heirs," but still, unless he was previously in, as of tenant right, he would take nothing but the seignory rights during his own life, with remainder to the heirs ex parte maternâ. As customary tenant, and having only a particular estate, he was capable of taking an enfeoffment of the seignory rights for the benefit of his wife's heirs, but not of his own. Unless it could be shewn that the wife's estate was absolutely extinguished by the conveyance of 1741, it was impossible for the heirs ex parte paternâ to take. That consequence, however, did not follow from the deed, because the husband was not himself previously entitled to the property in his own right. If baron, during his particular estate, acquires a right in addition to that which he enjoys in right of feme, the addition, whatever it may be, will descend with the principal estate to the heirs ex parte maternâ. Here the husband by the deed of enfeoffment acquired during his particular estate, as customary tenant, the seignory rights, in addition to the wife's tenant right, and it follows, as a consequence of this principle, that the seignory rights so added to the wife's estate will descend upon her heirs. No union of the two estates

could take place in this case, nor could that ever have been contemplated, inasmuch as the husband had nothing to which any thing could be united, so as to confer an estate in fee-simple upon his heirs. The seignory rights were only superadded to the estate of the wife, and upon the husband's death they would descend upon her heirs. During the husband's life he had a common fee-simple, but upon his death the fee-simple of inheritance descended upon the heirs ex parte maternâ. On these grounds the heirs ex parte maternâ were entitled to the property. He cited, in support of his argument, *Com. Dig.* tit. *Descent,* C. *a.* 6. *Doe* v. *Huntington* (*a*), *Burrell* v. *Dodd* (*b*), *Stephenson* v. *Hill* (*c*), *Murrell's* case (*d*), *Gilbert's Tenures,* 208, et seq. *Watkins on Copyholds,* 559.

BAYLEY, J.—Upon the first point I entertain no doubt. An action of ejectment, which from first to last is a fictitious remedy, is founded upon the principle that the tenant in possession is a wrongdoer, and unless he is so at the time the action is brought, the lessor of the plaintiff cannot recover. According to decided cases, if the tenant is in possession, with the consent of the lessor of the plaintiff at the time ejectment is brought, it is an answer to the action, whatever may be the date of the demise laid in the declaration. This ejectment was brought on the 3d *May,* 1819. Before that time, it being understood that the lessor of the plaintiff had a claim to this estate, but it not being clear whether he should be able to establish his title, he enters into an agreement of bargain and sale with the defendant, then being in possession, for the whole fee-simple, in consideration of the sum of 90*l.*, and he stipulates, amongst other things, that the defendant shall have possession from the date of the agreement. The operation of that stipulation was to make the defendant tenant at will, and if the

(*a*) 4 East, 270.
(*b*) 3 Bos. & Pul. 378.
(*c*) 3 Burr. 1278.
(*d*) 4 Co. 21 b.

1823.



Doe v. Jackson.

lessor of the plaintiff had done any act to determine that tenancy, he might have brought ejectment; but not having done so, we are bound to say that at the time the declaration was served, the defendant was not a wrongdoer, and consequently cannot be evicted. Being so decided in our opinion upon this point, we need not have heard any discussion on the other, but inasmuch as the value of the property in question is inconsiderable, and as the parties have incurred considerable expence in bringing the present ejectment, and it being suggested that the defendant would probably acquiesce in the opinion of the Court, if it was in favour of the lessor of the plaintiff, we yielded to the desire expressed of having that point submitted to our judgment on the present argument. Upon adverting however to the facts of the case, I can by no means give a decisive opinion in favour of the lessor of the plaintiff; on the contrary, I think this a case of as much difficulty as the Court have, for a considerable length of time, had under their consideration. My opinion is rather in favour of the defendant. The facts are shortly these:—*Ann Leece*, who was afterwards the wife of *Joseph Hunter*, was seised as of tenant right in fee of the premises in question. The effect of the marriage with *Hunter* was to give him seisin in right of the wife, who was admitted to her and her heirs, as the tenant of a tenant right estate. Having seisin in himself by these means; in the year 1741 a conveyance is executed, and the question turns upon the exposition of that instrument. The conveyance states that *Hunter* had bargained for the purchase of the freehold of inheritance of the land in question, and that the lord had granted, bargained, sold, aliened, enfeoffed, and confirmed, unto him, his heirs and assigns, that land, which was then, beyond all doubt, the inheritance of the wife. I take it to be quite clear that this conveyance would not annihilate the wife's estate, but, on the contrary, that the fee which she had before that time, would continue in her, and descend to her heirs. As a consequence of this, I am at

present of opinion that the lessor of the plaintiff in this action, before he can recover, must shew that prior to this conveyance, the fee was in the husband. This deed must operate either as an enfeoffment, or as the grant of a new inheritance in fee to the husband. If it operates by way of enfeoffment, it releases the estate of which the husband and wife were before seised, from the seignory rights, to which it was previously liable, but still it would include the estate of which the wife was before seised, as of tenant right, and the estate would then be rendered an absolute estate in fee. Supposing it operates as a new estate of inheritance in fee to the husband, what estate would he take? Husband and wife were before seised to them and the heirs of the wife, as of tenant right, and therefore at that time the husband had no more than a common fee-simple, and inasmuch as the deed would not annihilate the wife's previous estate, I think the necessary effect would be, that if the husband died, the wife would become seised in fee absolutely; but if she died before her husband the estate would descend upon her son, not as paternal, but as maternal heir. The argument, on the part of the plaintiff, is, that the deed does not operate by way of enfeoffment. I am of opinion that it does. If it does not, what would be the consequence? Why, it would give to the husband an estate in fee, and, during his life, the interest of the wife would be suspended, because during that period the wife's estate would be vested in the husband by virtue of her tenant right; and the husband would stand in the double relation of owner pro tempore of the seignory, and also of the tenant right estate. Therefore there would be a suspension of the wife's right during his life, and upon his death the seignory, as well as the tenant right, would descend upon his eldest son, and then the son would become tenant in fee-simple, because the tenant right estate would merge in the seignory, and would go to the paternal heir; but inasmuch as this deed may operate by way of grant (and if it may operate before

1823.

Doe v. Jackson.

livery of seisin is executed, it would operate so as to enfeoff the tenant right estate), and as the husband had a son entitled to the tenant right estate, and was capable also of taking an enfeoffment by way of grant, I am inclined to think that this deed operates not by way of grant of the estate in fee, but as an enfeoffment of the tenant right estate. And if so, then the wife's estate became a tenancy in fee-simple, and descended upon her heirs, and those who derive title from those heirs have a right to claim as heirs ex parte maternâ. This defendant is heir ex parte maternâ, and is therefore, as it seems to me, entitled to judgment.

Holroyd, J.—The present inclination of my mind upon the principal point is in favour of the defendant; but if there had not been the other ground on which we are bound to give judgment in his favour, I should require further time to consider the case before I gave a decided opinion. It is found by the case, that before the marriage of *Ann Leece*, she was possessed of the estate in question as of tenant right to her and her heirs, according to the custom of the manor. Upon her marriage, her husband became seised in her right of a descendible estate to her in fee, of a tenant right estate, in her right. The feoffment, together with the livery of seisin to the husband, was, I think, in point of law, sufficient to constitute him a customary tenant, so as to enable him to receive from the lord a grant by deed of the seignory rights, during the continuance of his own customary estate in the premises. A feoffment is made by the lord, by which he grants the customary tenement to the husband in fee. So far as that will operate by way of grant, it would give to the husband an interest immediately, and he need not have waited until livery of seisin was given upon it; but as a conveyance of the estate itself, nothing would pass until livery of seisin was given. In the case of *Wynne* v. *Cookes* (a), where the copyholder had only a par-

(a) 1 Bro. C. C. 515.

ticular estate, it was held, that the enfranchisement by him was not only for the benefit of himself, but of all the persons in remainder. That case goes to shew, that a copyhold estate may be enfranchised on the copyholder becoming seised of a freehold estate, merely by grant, without any absolute conveyance of the lord's right to him. But though it does not operate by way of conveyance of the lord's right, yet it operates as an enfranchisement of the copyhold estate; it extinguishes the base tenure for ever, as was held in that case. So in *Roe* v. *Briggs* (*a*), in which there was a feoffment in fee of the customary estate, both by the lord of the manor and the particular freeholder, it was held, that that was an enfranchisement of the customary estate for the benefit, not only of the tenant for life, but of those in remainder afterwards. In this case also the deed operated as an enfranchisement, not only during the life-time of the husband, but as an extinguishment of the base tenure for ever. In the case referred to, the freehold was, by operation of law, gone out of the lord, and became vested in those who were entitled immediately and subsequently to the customary estate. Therefore, supposing the husband in this case had an estate during his own life, or the life of his wife, or could be considered as tenant by the courtesy after her decease, still, according to *Roe* v. *Briggs*, the conveyance would operate as an extinguishment of the base tenure for ever. It would operate as an enfranchisement of the lord's seignory rights. This is the way in which this case strikes me. I have no decided opinion upon it; but as far as I understand the effect of the case at present, this is the declaration of my opinion. Upon the other point I agree with my Brother *Bayley*, that as the lessor of the plaintiff had not determined the tenancy of the defendant, and as he remained in possession by virtue of the agreement, at the time the action was brought, the judgment of the Court must be for the defendant.

(*a*) 16 East, 406.

1823.

DOE v. JACKSON.

Best, J.—I am also of opinion, upon the first point, that the lessor of the plaintiff is not in a condition to maintain this action of ejectment, the defendant's tenancy not having been determined at the time it was brought. Upon the second point I entertain a strong inclination of opinion that the defendant is entitled to retain the possession of this property. This estate having come into the family ex parte maternâ, it will descend to the heirs ex parte maternâ, if the course of descent has not been interrupted. The question is, whether that descent has been interrupted. It is argued, that it has been interrupted by the union of the two estates, the customary with the freehold, by means of which the customary estate was extinguished, or united with the freehold, the latter having been acquired by purchase. That is not by any means the case. I take it, that this estate would descend from the mother to the son from the time of the execution of this deed, upon which the question turns. The only part of that deed which has raised any doubt on my mind is, that the conveyance is to the husband "and his heirs," and not the heirs of the wife. But though it purports to be a conveyance to the husband and his heirs, it seems to me that the deed must be wholly inoperative if taken in that light, because the husband is in no condition to take an estate to him and his heirs. He was not tenant of the land before, as of tenant's right, and unless it can be shewn that he was tenant of the land as of tenant's right, the deed will convey nothing to himself. He was not in of his own right, but only in right of his wife, so that the deed could only operate on her right. The only effect which can be given to the deed is to consider it as an extinguishment of the estate as a customary tenure, by a release of the seignory. It could never have been intended that there should be a separation of the two interests. It is clear that the intention of the parties was merely that the lord should give up his right of seignory, the effect of which was to extinguish the base tenure, and raise it from a customary



estate into an estate of freehold. If it operates to raise the estate, it can only raise it in the hands of the person to whom it then belonged, and that was the wife. I believe it will be found that there are cases in which it has been held that where property is added to that which the wife enjoys in her own right, the addition will pass to the heirs ex parte maternâ. For instance, estovers which were granted to the husband, have been considered as an addition to the wife's estate, and have passed to her heirs, together with the other property which she held in her own right. There are other instances of the same description. In those cases, I believe, it will not be found that such additions have been considered as altering the course of descent. On the contrary, such property has descended to the heirs ex parte maternâ, carrying with it the addition which has been acquired. We must consider this case as one in which it was the intention of the parties to include the two estates, and not to create a separation. I am at present of opinion, that the deed in question cannot be considered as altering the course of descent, and therefore the property will go to the heirs of the wife. As there is no positive decision cited in opposition to this view of the question, I think we ought to decide in favour of that which appears to be the justice of the case. Nothing but a positive decision, in opposition to the view I have taken of it, would incline me to adopt a different opinion.

Judgment of nonsuit.

1823.



Laing *v.* Barclay.

By letter of credit, merchants in *London*, agree to accept at *ninety days* sight the drafts of a merchant, at *Demerara*, on receiving the bills of lading, &c. of certain colonial produce, to be remitted, and add, "On receiving these documents, and *no irregularity appearing*, we shall accept your drafts *at the usual date*, to the extent of 30,000*l*." In pursuance of this agreement two several cargoes are remitted in different ships, and shortly afterwards the consignor draws a bill at *six months*, upon the credit of the cargoes remitted, and in the bill directed the same "*to be charged to account as advised*," without specifying to the account of which cargo it is to be placed, and the consignees refusing to accept:—Held, that they were liable upon their agreement in damages for not accepting.

Assumpsit to recover from defendant as surviving partner of *Gurney Barclay*, deceased, the sum of 100*l*. paid by the plaintiff, upon a certain bill of exchange, for 500*l*., drawn by plaintiff on defendant and his deceased partner, and damages, for the non-acceptance thereof, and also the sum of 421*l*. 1*s*. 11*d*. the produce of certain goods sold by defendant and his partner on plaintiff's account. The defendant pleaded the General Issue, paid 21*l*. 1*s*. 11*d*. into Court, and gave notice of a sett-off. At the trial, before *Abbott*, C. J., at the *London* adjourned Sittings after *Trinity* Term, 1821, the plaintiff had a verdict, with damages, 525*l*. subject to the opinion of the Court upon the following case:—

The plaintiff, *James Laing*, was a merchant, residing at *Demerara*, and corresponded with his brother, *George Laing*, a merchant, in *London*. The defendant, and his deceased brother, were also trading under the firm of *Barclay Brothers*, merchants, in *London*. In the month of *September*, 1818, *George Laing* applied to *Barclay* Brothers, and requested them to give the plaintiff a letter of credit to the extent of 30,000*l*., to which they assented, and wrote the following letter to the plaintiff:—"Sir, Mr. *George Laing*, of this city, has done us the favor to give us your address, and has made to us the following proposition *in your behalf*; viz. that we should give you a letter of credit to the amount of 30,000*l*. in order to enable you to purchase produce to load, for this port, the *William Penn*, the *Henry*, and the *Susan*, now on their voyage to your colony; that we should accept your drafts on us *at ninety days sight*,

1823.



LAING v. BARCLAY.

on receiving invoice and bill of lading, with orders for insurance to the extent of 90*l*. per ton for coffee, 28*l*. per ton for sugar, 1*s*. 6*d*. per gallon for rum, and 1*s*. 6*d*. per pound for cotton; and he directs that the balance of the proceeds of these cargoes, after deducting our advances, charges, and commission, should be paid to him, Mr. *George Laing*. In reply to this proposition, we hereby consent to make the advance required upon the terms described, receiving the bills of lading filled up to our order, with the particular freight specified, and accompanied by an order for insurance. On receiving these documents, and *no irregularity appearing*, we shall accept your drafts *at the usual date*, to the extent of 30,000*l*." On the 23d *January*, 1819, the plaintiff inclosed to the defendant a bill of lading for a quantity of rum and coffee by the ship *Susan*, with an invoice, and an order to insure to the amount of 800*l*. and on the 26th *February*, he inclosed a further bill of lading on colonial produce by the ship *Henry*, with an invoice, and an order to insure to the amount of 1800*l*. with a direction to the defendant to hold the proceeds, and abide by his future advice. On the 4th of *March*, the plaintiff drew upon the defendant a bill of exchange in the following terms:—"*Demerara*, 4th *March*, 1819. *Six months after sight* of this my second exchange, first, third, and fourth unpaid, pay to *George Ross*, Esq. or order, 500*l*. sterling, value received, *and charge the same to account as advised*." The cargoes of the *Susan* and the *Henry* reached the hands of the defendant and his brother before the bill was presented for acceptance, and upon being subsequently presented, they refused to accept it. Previous to the presentment of the bill, and after the arrival of the cargoes, *George Laing* became insolvent, and on the 11th of *May*, the defendant wrote to the plaintiff, advising him of the non-acceptance of the bill, and stating as the reasons for his refusal to accept it, his not having explained on what account it was drawn, and the adverse situation of his brother's affairs;

1823.

LAING v. BARCLAY.

but in that letter no mention was made of the date of the bill. The bill was returned to the plaintiff at *Demerara*, who was, by the laws of the colony, compelled to give security for the amount of the bill, and the colonial damages, which was 25*l.* per cent. The plaintiff, on receiving advice of the dishonor of the bill, made a further shipment to the defendant by the *Alliance*, with directions to sell the same on his account, and with the proceeds to protect the bill when due. On the 6th of *November*, when the bill became due, and was presented to the defendant, he paid 400*l.* on account of it, but refused to pay the remainder, which, together with the expences, the plaintiff was ultimately obliged to pay. The proceeds of the shipment by the *Alliance* were 421*l.* 1*s.* 11*d.* of which the 400*l.* paid by the defendant on account of the bill was part. The question for the opinion of the Court was, whether the plaintiff was entitled to recover.

Brougham for the plaintiff. The question is, whether the bill of exchange upon which the action is brought, was drawn in conformity with the conditions contained in the defendant's letter of the 3d of *September*, 1818, because if it was, the plaintiff is entitled to recover. There are two objections taken to the bill, first, that it is drawn at "six months after sight," and, second, that it is directed to be "charged to account as advised." The first of these objections, however, never occurred to the defendant, until this action was brought. Neither of them, however, is available. The conditions are in these words:—"We consent to make the advance required upon the terms described, (which allude merely to the rates of insurance) on receiving the bills of lading, filled up to our order, with the particular freight specified, and accompanied by an order for insurance. On receiving these documents, *and no irregularity appearing*, we shall accept your drafts *at the usual date*." First then, with regard to the date. There is no-

1823.

LAING v. BARCLAY.

thing in the defendant's undertaking as to ninety day's sight; it only prescribes that the bills shall be drawn "at the usual date," and, non constat, that "six months sight" is not "the usual date" for bills drawn at *Demerara* upon *London*. If the date was unusual, it was for the defendant to have proved it at the trial; but he did not, and the Jury have found that it is "the usual date." Upon the same principle, it follows that the adoption of that date was not an "irregularity." Then, was it prejudicial to the defendant? Clearly not; it was decidedly beneficial to him, as it gave him a longer interval to provide for the claim made upon him. As to the direction of the bill to be "charged to account as advised," how is this an irregularity? This is the universal language of the commercial world in such transactions. Did it contravene any of the conditions in the defendant's undertaking? It could not, because there is no allusion to the subject in those conditions. Was it prejudicial to the defendant? Quite the contrary; for it gave him an unlimited and general control over the proceeds of both the cargoes, instead of confining either of them to this particular bill. What then is the objection to the acceptance of the bill? None but the failure of *George Laing*, and that affords no legal answer to the present action.

Campbell, for the defendant. However equitable the plaintiff's claim may be, it cannot be supported in a court of law. The defendant's undertaking was altogether conditional; and if the plaintiff has not observed the conditions, this action cannot be maintained. One of the conditions is, that no "irregularity" shall appear. But upon the face of this bill there does appear an "irregularity;" for the plaintiff first desires a separate account to be kept in respect of each of the cargoes, and then draws a bill, without stating to which of those accounts it is to be charged. It is to be "charged to account as advised." How advised? No advice is ever forwarded upon the subject. It might

1823.

LAING v. BARCLAY.

apply to the *Susan*, or it might apply to the *Henry*. How was the defendant to judge between them? To which ever account the defendant charged it he might have been wrong, and therefore a bill so drawn was *irregular*, and in violation of the terms of the agreement. Another condition was, that the bills should be drawn at "ninety days sight," or at "the usual date." Both these expressions are found in the defendant's letter, but that letter must be taken as a whole; one part of it must be read as illustrating and explaining the other; that is the only just way of reading it, and in that view it is not too much to say that the condition was absolute, that the date should be "ninety days sight." The redundancy of expression proves that "ninety days sight" was "the usual date," and that it was at *that* date the bills were to be drawn. But even waiving that argument, the plaintiff has still violated the agreement. Can it be assumed that *six months* sight is "the usual date?" No evidence has been produced of that fact, and it was competent to the plaintiff to have produced it, if any such were in existence. The defendant, in making this promise, was incurring great risk and heavy responsibility. His promise therefore ought to be construed strictly and rigorously, and the slightest deviation from its terms ought to operate as a total release. It has been decided that a guaranty to accept a bill for a given sum will not extend to a bill of any greater amount, *Philips* v. *Astling* (a), and the principle will operate as well in reference to any other terms of a bill as to the sum. It is clear that the plaintiff meant the bills to be drawn at ninety days sight; this intention the plaintiff has defeated; and if any variance be allowed, where is the line to be drawn? But there is one view of the case in which it will appear that the defendant might have been very seriously prejudiced by this extension of the date. Suppose the proceeds of the cargoes had been insufficient to protect the advances, in that case the plaintiff would have to look to

(a) Taunt. 206.

1823.

LAING
v.
BARCLAY.

George Laing for his security, and his claim upon him would have been delayed very considerably, and indeed so long as to render his security wholly unavailable, because he might have become insolvent during the interval. It seems clear, therefore, that the plaintiff has in two material points violated the conditions upon which the defendant's undertaking was given, and therefore he is in no condition to maintain this action.

Brougham, in reply, was stopt by the Court.

BAYLEY, J.—There is no difficulty in this case. The engagement which gave rise to the action originated in the letter of the 3d of *September*, 1818. That letter is written by *George Laing*, making a proposal in favour of his brother *James*, which proposal the defendants by their answer accept with reference clearly to *James*. In pursuance of the agreement thus entered into, *James* makes shipments, first by the *Susan*, and afterwards by the *Henry*, and it is not suggested, so far as the invoices, the bills of lading, and the orders to insure, are concerned, but that those shipments are made in strict compliance with the terms of the agreement. Then on the 4th of *March*, 1819, he draws the bill for 500*l.* and the question is, whether that was such a bill as by those terms he was warranted in drawing, and the defendant was bound to accept. It is drawn "at six months sight," and is directed to be "charged to account as advised," not specifying, certainly, to which account it is to be charged, whether to the shipments by the *Susan*, or to those by the *Henry*. The reasons given by the defendants at the time for his refusal to accept this bill, were two; first, in not stating on the face of it to which account it was to be placed; and second, that as George had become insolvent, he was no longer in possession of his security for his advances, and therefore was released from this undertaking to advance at all. These were the only reasons then given for

1823.

LAING v. BARCLAY.

not accepting the bill, for no objection was made to the date of the bill at that time, although it is relied upon now. It is perfectly clear to my mind, that the insolvency of *George* had no effect whatever upon the contract entered into between the defendants and *James*, nor indeed is that point contended for now. Then as to the other two objections; first, was the omission to state to which account the bill was to be placed, such a deviation from the contract as exonerated the defendants from a liability to accept? I am of opinion that it was not, at least not in toto. The defendant had two courses, either of which he would have been justified in pursuing; he might have placed the bill to whichever of the two accounts he preferred; or, he might have waited until he had written for precise instructions on the subject. But he pursues neither of these. He keeps the money arising from the proceeds of both shipments, and does not charge the bill to the account of either. This I think he had, under no circumstances, a right to do, and therefore I am of opinion that this objection affords no ground for the non-acceptance of the bill. Then, secondly, what is the effect of the variation in the date of the bill? If the letter of the 3d of *September*, 1818, had contained a specific condition that all the bills should be drawn at "90 days sight," in terms, there might be very considerable weight in this objection. But that is not the fact, nor are there any circumstances in the case from which we are obliged to infer, that it was the intention of the parties to confine the mode of drawing to that one date specifically. The words are "at 90 days sight," or "at the usual date." If six months had been an unusual date for bills drawn under such circumstances, the Jury, who are the best possible judges of such questions, would doubtless have found that fact. But they have not found it, and therefore it is quite impossible that we should infer it. Besides, in such a case as this, it is important to look to the relative situations of the parties, and to see whether the variation in the date

1823.



LAING v. BARCLAY.

made any real difference in their respective situations. I cannot see that it did. The defendant, in the first instance, had money in hand arising from the sale of the cargoes shipped; so far, therefore, he was secure, and it seems to me that the precise period at which he was to pay over that money was perfectly immaterial, but that at all events a protraction of that period, by drawing the bill at a longer date, could not possibly be prejudicial to his interests. I think the true meaning of the restriction with regard to the date of drawing is, that the bills should not be drawn at a *shorter* date than 90 days, and consequently that the drawing them at a longer period than that, was no violation of the contract. Upon these grounds I am of opinion that the defendant was never exonerated from his liability to accept this bill, and therefore that the plaintiff is entitled to recover his damages in this action for the omission.

HOLROYD, J.—I am of the same opinion. The object of the agreement was, that the plaintiff should consign goods to the defendant, and that the defendant should make advances upon account of those consignments. The defendant does not choose to bind himself to accept at a shorter date than 90 days, or the usual date, and the effect of that stipulation is, that he is bound to accept at any date not shorter than 90 days. There is some weight in the argument, that if the proceeds of the consignments turned out insufficient to cover the advances made, the defendant might be prejudiced by having accepted bills at a longer date, because it would be so much the longer before he would have any claim upon the guaranty of *George Laing*; but the short answer to that is, that it is quite clear from the terms of the contract, that the defendant never contemplated giving credit to *George*, and that he took effectual care to have available securities in hand before he made any advance at all. Then with respect to the direction of the bill, it seems to me quite unimportant to which account it was di-

1823.

Laing v. Barclay.

rected to be charged, or whether no account at all was mentioned. The defendant, by the agreement, became the factors of *James*, and in that character had a general lien upon all his consignments in respect of all the bills he drew. In fact, therefore, the defendant was benefited by this mode of wording the bill, because as the plaintiff did not limit that bill to the account of any particular cargo, the defendant had a right to extend it to all the cargoes, and thus his security became greater than it would have been, if he had specifically appropriated it to any one account. It seems to me, therefore, that neither of these objections affords a valid defence to the action, and that the plaintiff is entitled to the judgment of the Court.

Best, J.—It has been argued, that we are to construe the letter in question strictly and literally, but considering it as an agreement of a mercantile nature, not relating to matters of mere law, I think we ought to give it a liberal construction, and for the reasons given by my learned Brothers, I think this action maintainable.

Judgment for the plaintiff.

Buckmaster v. Mackmahon.

Where defendant, sued by bill, had by rule "until two days before the *Essoign* day of the Term" to plead, and the *Essoign* day fell on a *Monday*, and defendant not having pleaded on the *Saturday*, plaintiff signed judgment as for want of a plea, the Court refused to set aside the judgment for irregularity.

THE defendant being sued by bill, had a rule to plead "until two days *before* the *Essoign* day of the Term." The *Essoign* day fell on a *Monday*, and on the *Saturday* defendant not having pleaded, plaintiff signed judgment as for want of a plea. On a rule to set aside the judgment for irregularity, the question was, whether *Sunday* being a dies non, the defendant had not till the *Monday* to plead, within the meaning of the rule.

*After hearing *Platt*, for the plaintiff, and *Chitty*, for the defendant,

1823.
BUCKMASTER v. MACKMAHON.

The Court, without laying down any general rule of practice in such cases, said, that as the object of the rule to plead was evidently to give the plaintiff an opportunity of signing judgment *before* the *Essoign* day of the Term, they could not say that the judgment in this case was irregularly signed.

Rule discharged (*a*).

(*a*) Vide *Coote* v. *Jacques*, 8 T. R. 77. *Palk* v. *Rendle*, Id. 465; and *Lee* v. *Carlton*, Id. 642.

CLAY and Others, surviving Administrators, with the Will annexed, of Assets unadministered by N. CALVERT and R. BOND, deceased, Executors of T. CALVERT, deceased, *v.* WILLIS, surviving Executors of PARKINSON.

THIS was an action for money had and received by the defendant's testator, to the use of *N. Calvert* and *R. Bond*, as executors of *T. Calvert*, which the defendant, as the surviving executor after the death of *N. Calvert* and *R. Bond*, promised to pay to the plaintiffs as administrators de bonis non. There were also counts for interest, and an account stated. Plea, the General Issue. At the trial before *Holroyd*, J. at the *Lancashire* Summer Assizes, 1821, the

C. in consideration of a loan of 400*l.* mortgages his real estate in fee to *W.* and *Co.* in trust, to sell the same, and after repaying themselves, to pay over the surplus to himself, his executors or administrators. Before any sale is effected, *C.* dies after making his will, by which he devises all his real and personal estates to trustees, whom he also appoints his executors, in trust, to sell the same, and pay debts, and discharge incumbrances. In the life-time of these trustees, *W.* and *Co.* the original mortgagees, sell the estate, and pay over the surplus into the hands of the testator's trustees and executors attorney. Before the money is disposed of, the trustees and executors, and also their attorney, die. Plaintiffs take out administration de bonis non, with the will of *C.* annexed, and sue the attorney's executor in assumpsit for money had and received:—Held, that the money in the hands of the latter was equitable, and not legal assets, and consequently could not be recovered at law:—Held also, that an express promise by the defendant to pay the plaintiffs the money in question, was a nudum pactum, they having no title to it in a court of law.

1823.



CLAY v. WILLIS.

plaintiffs had a verdict for 1000*l.* subject to a reference as to the amount of interest, and to the opinion of the Court upon the following case:—

By indentures of lease and release, dated 8th and 9th *April*, 1795, made between *T. Calvert*, of the one part, and *T. Worswick*, *R. Worswick*, and *A. Worswick*, of the other, the release reciting that *T. Calvert* had opened an account, and borrowed the sum of 400*l.* at interest, and that it was agreed as a condition of the loan, that *T. Calvert* should convey the premises thereinafter mentioned, to secure the payment of that sum, and of any other sums which might be advanced by Messrs. *Worswick*, with commission, interest, &c. In consideration of the said sum of 400*l.* and for other consideration therein mentioned, *T. Calvert* conveyed to Messrs. *Worswick*, and their heirs and assigns (amongst others) certain freehold premises in *St. Leonard's Gate*, in *Lancaster*, to hold the same to them and their heirs and assigns for ever. The release then empowered Messrs. *Worswick*, their heirs, &c. to make sale of the premises, and transfer them, whether *T. C.* his heirs, &c. was or were not parties to the conveyance, and in the mean time Messrs. *W.* their executors, &c. were to receive and give discharges for the rents, issues, and profits of the said premises, to the respective tenants thereof, and then to pay, apply, and dispose of the monies to be raised by the sales, and recovered therefrom, in the manner following; viz. in the first place, that they should thereout discharge the costs and charges of the said recited deeds, and also the costs attending such sale or sales, and of executing the trusts, &c.; and after the payment thereof, then that the said Messrs. *W.* their executors, &c. should retain and pay themselves thereout, not only the said sum of 400*l.* with lawful interest, but also such further advances if any as they should make, with commission, interest, &c. And after payment thereof, then upon trust that they the said Messrs. *W.* their executors,

&c. should pay and apply the surplus monies, if any should remain in their hands after discharging the full of their demands against the said *T. C.* to him the said *T. C.* his executors or administrators, or to such person or persons to whom he or they should, by any writing or writings under his or their hands, direct or appoint the same to be paid, and to or for no other use, trust, intent, or purpose whatsoever. The release then contained a declaration that the receipts of the Messrs. *W.* should be sufficient discharges, and a covenant by *T. C.* for payment of the principal and interest, and to execute conveyances if required. *T. Calvert* died in *October* 1799, insolvent, and by his will, after charging all his real and personal estates with the payment of his debts and funeral and testamentary expences, gave, devised, and bequeathed all his messuages, lands, tenements, hereditaments, real estate, leasehold, and chattel interests in estates, and his goods, personal estate, and effects, and all his estate, property, and interest therein, to his sons *John* and *Nathaniel Calvert*, and his grandson *Robert Bond*, to hold to them, their heirs, executors, &c. for ever, for and according to the nature, and tenure thereof, upon trust, to sell his freehold and leasehold lands and tenements, and to convert his personal estate, merchandize, and effects, into money, and collect his debts, and apply the produce of the whole, first in paying his expences, then his debts, and to divide the surplus as therein mentioned; and he appointed his said sons *John* and *Nathaniel*, and *Robert Bond*, executors. By a codicil he revoked the appointment of *John* as a trustee and executor. Probate was duly granted to *Nathaniel Calvert*, power being reserved for *Robert Bond*, who afterwards died abroad, to take probate also. *N. Calvert* also died abroad, leaving part of the testator's goods unadministered, and afterwards, on 16th *January*, 1810, administration de bonis non, with the will and codicil annexed, was granted to the present plaintiffs. After *T. Calvert*'s death, and during the life-time of the executors, *N. Calvert* and

1823.

CLAY v. WILLIS.

R. Bond, the said freehold premises in *St. Leonard's Gate*, were put up to sale by auction, and purchased by Mr. *W. Dowbiggin* for 1052*l.*; and in pursuance thereof the premises were conveyed to him by indenture of lease and release, to which *N. Calvert* and *R. Bond*, being described as trustees and executors under *T. Calvert's* will, were parties. The balance of the purchase-money, after deducting Messrs. *Worswick's* debt, &c. was 691*l.* 4*s.* was paid by *Dowbiggin* to *J. Parkinson*, the defendant's testator, who was an attorney at *Lancaster*, and acted on this occasion as solicitor both for Messrs. *Worswick* and *N. Calvert*, and *R. Bond*, the trustees and executors; and after paying the expences of the sale, and *Parkinson's* bill, the sum of 550*l.* remained in his hands. After the letters of administration granted to the plaintiffs, and after the death of the defendant's testator, several applications were made by the plaintiffs to the defendant, upon all of which the defendant admitted that 550*l.* arising from the sale of the premises in *St. Leonard's Gate*, was due from his testator to the estate of *T. Calvert*, on the balance of accounts, with interest, after the rate allowed by the *Lancaster* bank, from the 15th *March*, 1803. In *May*, 1818, a memorandum was produced and read to him by the plaintiffs' attorney, stating the said sum and interest to be due to the administrators of *T. Calvert*, from the said *J. Parkinson*, which the defendant acknowledged to be perfectly correct, and declared that he had always said he would pay it. He told the plaintiffs' attorney that an action was unnecessary, and that he was then going to *London*, and would pay it on his return. In *July* 1818, he said to a person who applied on behalf of the plaintiffs, that he would give a check for the amount a fortnight after his return from *London*. Afterwards, the defendant said he was advised he could not safely pay the money without an indemnity, and prior to these promises, the defendant said he would if he could with safety, but never denied that the sum of 550*l.* arising from the sale of

the premises, was in his hands as *Parkinson's* executor, and on one occasion he offered to pay it over on having a bill filed, and a decree, or on receiving an indemnity from the present plaintiffs.

Parke, for the plaintiffs, contended, that this action was properly brought by the plaintiffs as administrators de bonis non. Admitting that the money claimed was the proceeds of the testator's real estate, still that estate had been during his life-time conveyed to trustees, with absolute power to sell, and to retain the surplus, after payment of their own debt, as personal property. The testator had therefore at the time of his death no legal interest in the estate, although he had an equitable right to receive it back upon satisfaction of the debt to Messrs *Worswick*, and a legal right to the balance after the sale had been effected, which legal right survived to his executors. As executors, therefore, it is clear, that the plaintiffs might have maintained an action for that balance, and the same right belongs to them as administrators de bonis non. For this *Hirst* v. *Smith* (*a*), *Partridge* v. *Court* (*b*), *Cowell* v. *Watts* (*c*), *Powley* v. *Newton* (*d*), and *Catherwood* v. *Chabaud* (*e*), are authorities. (*Bayley*, J. In the case of a devise of real estate to executors with power to sell, are the proceeds of the sale, legal or equitable assets in their hands?). They are clearly legal assets, and there are many decisions to that effect, as *Girling* v. *Lee* (*f*), *Greaves* v. *Powell* (*g*), *Com. Dig.* (*h*), and *Toller's* Executor (*i*). It has been also held in *King* v. *Ballet* (*j*), that the money arising from the sale of a trust term, was legal assets, which is a very strong case, because by the statute of frauds such an interest is not made legal assets in the hands of the executor of the cestui que trust, and conse-

(*a*) 7 T. R. 182.
(*b*) 5 Price, 412.
(*c*) 6 East, 405.
(*d*) 2 Marsh. 147.
(*e*) Ante, 271.
(*f*) 1 Vern. 63.
(*g*) 2 Id. 248.
(*h*) Tit. *Assets*, C.
(*i*) Lib. 3. c. 8. s. 413.
(*j*) 2 Vern. 248.

1823.

CLAY v. WILLIS.

quently there was no legal mode of recovering the term. Now, all these cases go to shew, that although the testator has no legal interest in the estate at the time of his death, and consequently his executors can claim no legal interest in it, still, where the estate is sold, and the proceeds distributed agreeably to the will, the executors have a right to the surplus; and it is also clear, that the surplus in their hands, they being both executors and trustees, is legal assets. *Anonymous* (*a*), *Dyer*, 264, *Burwell* v. *Corrant* (*b*), and *Viner's Abridgment* (*c*). In this case, so soon as the money was paid into *Parkinson*'s hands, the trust had wholly ceased, and therefore the only proper means of recovering it was by an action in the present form. It cannot indeed be denied, that the assets in such cases are held to be legal only where the executor has an absolute power to sell, and therefore if the testator here had possessed the legal estate at the time of his death, and had devised that estate to trustees, without giving them an absolute power to sell, the money would certainly have been equitable, and not legal assets. *Silk* v. *Prime* (*d*). But the real question in this case is, whether the estate came to *Calvert* and *Bond* as devisees, or as executors, because if they took as devisees only, the present argument falls to the ground. But it is quite evident from the language of the will, that the testator intended them to take it as executors, and meant the proceeds to be legal assets in their hands, and distributable accordingly, for he directs the Messrs. *Worswick* to pay over the money to himself, *his executors, or administrators*. This case therefore seems to be clearly within the principle acted upon in all the authorities alluded to, and therefore the present action is maintainable.

Armstrong for the defendant. The estate in question was, undoubtedly, conveyed to Messrs. *Worswick* as a se-

(*a*) 2 Vern. 405.
(*b*) Hard. 405.
(*c*) Tit. *Executors*, C. a. 5.
(*d*) 1 Bro. C. C. 140.

curity for advances made by them, and therefore, although the deeds import an absolute conveyance, they amount in fact to a mortgage only. The decisions upon this point carry the principle even further than is necessary for the present argument. Here a loan of money is, upon the face of the deed, the only consideration for the conveyance; but in *Cripps* v. *Jee* (a) the loan was established by other evidence than the deed itself, and upon that evidence it was held to be a mortgage. So in *Bowen* v. *Edwards* (b) the deed itself did not afford evidence of a loan, but as it appeared that a bill had been filed by the father of the defendant for the land or the money, that also was held to be a mortgage. A similar rule was adopted in *Howard* v. *Harris* (c), and numerous other authorities might be mentioned establishing the same point. The result then in this case is, that the money in question was a part of the produce of the real estate of the testator sold after his death, and there must be shewn to be a clear right of action in the executors, as such, against the trustee, before the question of assets can arise; and as no such right has been established, that question does not arise, and this action is not maintainable.

The Court stopped him, and proceeded to give judgment.

BAYLEY, J.—When this case is considered in its true light, it seems to me to be free from all difficulty as a question of law. The defendant certainly has no right to keep the money, it ought to be distributed among the creditors of *Thomas Calvert*; but that distribution must be made according to the strict rules of law. Now the first rule is, that if the money is legal assets, the administrators de bonis non are entitled to it, and they are to distribute it among the creditors in proportion to the superiority of their claims; the second is, that if it is equitable assets, all the creditors

(a) 4 Bro. C. C. 472. (b) 1 Ch. Rep. 222. (c) 1 Vern. 190.

1823.

CLAY
v.
WILLIS.

will receive a share pari passu. The deed of 1795, in my opinion, amounts to no more than a mortgage. There is a loan to *Thomas Calvert*, a covenant by him for the re-payment of that loan with interest, and a power of sale in case of default; but that power of sale had in view, first, the repayment of the principal money, and then the delivery of the surplus to himself, his executors and administrators, or any person whom he or they should appoint. The estate was not sold till after the testator's death, and therefore at the time of his death he had an equity of redemption, which if he had made no will would have descended to his heir; if free from charge, to his own use; and if charged, then as equitable assets in his hands. But the testator does dispose of it, and in these express terms: "all my messuages, lands, tenements, hereditaments, real estate, leasehold and chattel interests in estates, goods, personal estate and effects, and all my estate, property, and interest therein, to my sons *J.* and *N. C.*, and my grandson *R. B.*, to hold to them, their heirs, executors, administrators, and assigns, for ever, upon trust to sell," and then he appoints them his executors. He, therefore, unites in their persons the characters of executors and trustees, but he makes the devise to them in the latter character. The property devised then was an equity of redemption, and it came to them in their character of trustees, and was received for them as such by their agent. Then was the money legal, or was it equitable assets? I think it was clearly equitable, and upon two clear principles; first, that the subject-matter of the devise was equitable property at the time of the testator's death; and, second, that the devise was in trust to pay debts. With respect to the first, it was held in Sir *Charles Cox*'s case (*a*), and in *Hartwell* v. *Chitters* (*b*), that the equity of redemption of a term was equitable assets, and so therefore is the equity of redemption in this case. With reference to the second, there are a great many cases directly in point.

(*a*) 3 P. Wms. 341. (*b*) Amb. 308.

There is the early case of *Lewin* v. *Okeley* (*a*), then *Silk* v. *Prime* (*b*), where all the former cases were fully considered, and *Newton* v. *Bennett* (*c*); all which have been recently reviewed and recognized as law by the present Lord Chancellor, in *Bailey* v. *Ekins* (*d*), and *Shiphard* v. *Lutwidge* (*e*). Some of the old cases alluded to in argument have certainly decided that the proceeds of lands devised to trustees for the payment of debts, they being also made executors, are legal assets; but all the more recent authorities are decidedly the other way. I am therefore of opinion that the proceeds of this estate were equitable assets; and it is conceded, that if they are so, the administrators de bonis non cannot pray in aid the covenant to repay. The promise made by the defendant in this case to pay over the money cannot affect the question now before the Court; it was made to a person not legally entitled to the benefit of it, and is therefore, as between those parties, a nudum pactum. Upon these grounds I am clearly of opinion, that the defendant is entitled to judgment of nonsuit.

HOLROYD, J.—I think this action not maintainable. The promise alleged to have been made by the defendant makes no difference in the case, because the executors would not be entitled to receive the money. Such a promise would be nudum pactum, and could not be enforced in a court of law. The deed of the 8th and 9th of *April*, 1795, appears to me only to amount to a mortgage with a power of sale. If the power of sale so given was executed, and the real estate converted into money in the life-time of the person standing in the situation of mortgagor, the surplus would have passed to his personal representative; but not being converted in his life-time, I apprehend that, independently of the will, the equitable right to the estate

(*a*) 2 Atk. 50.
(*b*) 1 Bro. C. C. 140.
(*c*) 1 Id. 134.
(*d*) 7 Ves. 319.
(*e*) 8 Id. 26.

1823.

CLAY v. WILLIS.

would pass to the heir-at-law, and not to the personal representative, and upon redeeming the mortgage he would be entitled to the legal estate. If he declined doing that, and suffered a sale to be made by the mortgagee, the surplus would go to him, and not to the executor. The trust to sell given to the executors, even though executed, would not make the proceeds legal assets, nor make any difference in the case, so as to convert the property into a personal estate, and vest it in persons filling a representative character. Whatever may have been decided in former cases, some of which are in *Vernon*, it has been since completely settled that a devise to trustees (who are also made executors of the will), in trust to sell for the payment of debts, &c. does not convert the proceeds into legal, but renders them equitable assets. This is established by the cases which have been alluded to in argument; *Newton* v. *Bennett*, *Silk* v. *Prime*, *Lewin* v. *Okeley*, *Barton* v. *Boucher*, and *Batson* v. *Lindegreen* (*a*). It is fully established, therefore, that in such a case as the present the assets are equitable and not legal. If they are equitable, then the heir of the surviving trustee was the person to receive and account for them, and not the personal representative of the testator, and therefore the present plaintiffs who fill that character are not the persons to receive the money arising from the sale.

BEST, J.—After the full discussion which this case has received, it is scarcely necessary I should say a word upon the subject. It appears to me, from the cases which have been referred to, that these are equitable and not legal assets, and consequently the present plaintiff has no right to dispose of them; and if he has, this is not the mode of recovering equitable assets. It has been forcibly urged, that this is nothing more than a mortgage, and several cases have been cited as establishing that, upon the death of the mortgagor, he had no more than an equitable interest in the pro-

(*a*) 2 Bro. C. C. 94.

perty, and consequently, that upon the sale, the proceeds would still be equitable. We do not, however, want the authority of decisions in a Court of Equity for holding, that whenever property is sold, the proceeds must follow the nature of that from which they are derived. If the property sold was equitable, it follows that the proceedings must be of the same character. It is only necessary to look to the words of the will to satisfy us that this is equitable property, and cannot go to administrators de bonis non. A trust is clearly created, and that trust continues in the surviving trustee, who has the legal interest. If the plaintiffs have any claim, it is in equity, and not in a court of law. This case is clearly distinguishable from *Ctherwood* v. *Chabaud*, because in that case there was no pretence for saying that the property was equitable. There the bill of exchange was clearly legal assets, and the only doubt was as to the person to whom the legal remedy belonged. I am therefore of opinion, that the plaintiffs in this case have no title to maintain this action.

Judgment of nonsuit.

L. FLANAGAN, Esq. *v.* WATKINS.

Where an indemnity bond was given, conditioned to save plaintiff harmless from the payment of an annuity, "*and* from all actions, suits, damages, and costs which should be brought against him, or that he might sustain by reason of the non-payment of the annuity:"—Held, that this was not merely a money bond within 3 *Jac.* 1. c. 8, requiring bail, upon a writ of error brought to reverse a judgment in an action upon the bond.

DEBT on an indemnity bond. The case was this:—In *March*, 1811, the plaintiff, having become surety for the defendant for the payment of an annuity of 300*l.* per annum, granted to one *James Martin*, obtained from the defendant a bond in the penalty of 4200*l.* which, after reciting the annuity deed, contained the following condition: "If the above bounden *G. W.* his heirs, &c. do and shall

1823.

FLANAGAN v. WATKINS.

from time to time, and at all times hereafter, well and sufficiently save, defend, keep harmless, and indemnified the said *L. F.* his heirs, &c. and his and their lands, &c. respectively, of, from, and against the payment of the said annuity, and from the payment of such extra premiums for insurance, loss, costs, charges, damages, and expences as aforesaid, and also of and from the covenants, conditions, provisoes, declarations, and agreements in the said indenture and warrant of attorney respectively contained, and of and from the payment of all sum and sums of money thereafter to grow due thereon, or become payable in respect or by virtue thereof, and of, from, and against all and all manner of action and actions, &c. which should or might be brought, &c. against, or that he the said *L. F.* his heirs, &c. should or might bear, &c. by reason of the non-payment of the said annuity, and also by the non-payment of such extra premium for insurance, &c. or for or by reason of the said *L. F.* having executed the said indenture and warrant of attorney respectively, or in anywise howsoever relating thereto, then," &c. In *October* 1812, the defendant became bankrupt, and in the following *December* the plaintiff re-purchased the annuity from *Martin* at the price of 3200*l.* In *Trinity* Term, 1817, the plaintiff brought an action against the defendant in this Court, to recover the money so paid, and in *October* 1819, judgment was given for the plaintiff in that suit on demurrer (*a*). At the Sittings after *Trinity* Term, 1821, a writ of inquiry to assess the plaintiff's damages was executed before the Lord Chief Justice, when a verdict was entered for the plaintiff, with 2175*l.* damages and costs. In *Michaelmas* Term, 1821, the defendant filed a bill in Chancery, and obtained an injunction to restrain the plaintiff from suing out execution against him for those damages and costs, which injunction was dissolved by the Vice Chancellor in *June* 1822. On the 10th of *July* in the same year, the defendant

(*a*) 3 Barn. & Ald. 186.

served the plaintiff with the allowance of a writ of error in the Exchequer, and also filed an amended bill in Chancery to restrain the plaintiff from suing out execution upon his verdict; and upon the last day of *Michaelmas* Term last, the plaintiff obtained a rule to shew cause why he should not be at liberty to sue out execution, notwithstanding the writ of error, on the ground that it was brought for delay, and that no bail in error had been put in and perfected. The affidavit filed by the defendant, in answer, swore, that he had been advised by counsel that there was error on the record, and denied that the writ was brought for delay.

Platt now shewed cause.—The object of this rule is to compel the defendant to put in bail in error under the statute 3 *Jac.* 1. c. 8. (*a*), which, under the circumstances of this case, and considering the nature of this bond, the Court will not order him to do. This was an action upon an indemnity bond, and the condition is not simply to indemnify the plaintiff from the payments of the annuity, but also from the effect of certain covenants, &c. contained in the annuity deeds, and the plaintiff in his declaration assigned breaches upon both those points. The statute is confined expressly to bonds conditioned for the payment of money *only*, which this is not. The defendant has sworn, that he is advised by counsel there is error on the record, and that the writ of error is not brought for delay, and therefore, unless the bond itself is within the statute, the Court will not compel the defendant to put in bail. It has been decided in several cases, that a bond for the payment of money, *and* for the performance of covenants of whatever nature, does not fall within the scope of the statute, *Gerrard* v. *Danby* (*b*), *Butler* v. *Brushfield* (*c*), *Thrale* v. *Vaughan* (*d*), and *Hammond* v. *Webb* (*e*). Now if this

(*a*) Made perpetual by 3 Car. 1. c. 4. s. 4.

(*b*) Carth. 28. 1 Show. 14.—2 Keb. 131.

(*c*) 10 East, 407.

(*d*) 2 Stra. 1190. 1 Wils. 19.

(*e*) 10 Mod. 281.

1823.

FLANAGAN v. WATKINS.

can be considered a bond for the payment of money, still it is a bond for the performance of covenants also; and is clearly governed by all these cases. If it is not a bond for the payment of money *at all*, which it scarcely can be said to be, being an indemnity bond, à fortiori it is released from the obligation imposed by the statute. Upon these grounds it is quite clear that this rule ought to be discharged.

J. Evans, in support of the rule.—The Judges of this Court have of late years repeatedly declared, that they would not countenance the practice of bringing writs of error beyond the strict line up to which the law allowed them, and in pursuance of that declaration, have been in the habit of construing this act of parliament as liberally as possible. This is a bond for the payment of money only, within the object and meaning of the legislature, for the payment of money is the only material part of it, and the other provisoes being quite immaterial and subordinate, cannot affect the operation of the rule laid down in the statute. This has been decided in several different instances. In the case of a mortgage deed containing a covenant for the re-payment of money; *Buckney* v. *Meetham* (a); in the case of a bottomree bond, by which the money was payable upon a contingency which had happened; *Pitt* v. *Coney* (b), *Scot* v. *Brace* (c); and in the case of a bond conditioned for the payment of money where the sum was originally uncertain, but was afterwards reduced to a certainty; *Dean & Chapter of St. Paul's* v. *Capell* (d). In *Chauvet* v. *Alfray* (e), this statute was held to be remedial, and ought to be so construed. Where a bond is conditioned *not* for the payment of money only, still when a breach is assigned for the non-payment of money, it becomes a bond for that purpose only, and the assigning an additional breach upon

(a) 3 Taunt. 383.
(b) 1 Stra. 476.
(c) 6 Mod. 38.
(d) 1 Lev. 117. 1 Keb. 613.
(e) 2 Burr. 746.

another part of the deed cannot vary the effect. So, where the payment of the money is conditional, when the condition is performed the obligation to pay becomes absolute, and the bond becomes exclusively a bond for the payment of money. The present case seems to fall within these principles, and the cases cited in support of the application. But in addition to this, the more recent statute of 16 & 17 *Car.* 2. c. 8. s. 3 (*a*), seems to be decisive in favor of the plaintiff's application, for it enacts, "that no execution shall be stayed by writ of error after verdict and judgment in any personal action whatsoever," without bail being first put in. Now this is a writ of error brought after verdict and judgment; and therefore upon the express language of this statute, as well as upon the authorities which have been cited, the plaintiff is entitled to have this rule made absolute.

BAYLEY, J.—The statute of *Charles* does not apply to the present case; it is confined expressly to cases where there has been a verdict after trial and judgment thereon, and not to cases where the defendant has suffered judgment to pass by default, as the present defendant has. The only question then is, whether by the terms of the statute of *James*, this is a bond such as renders it necessary for the defendant to put in bail in error, and I am of opinion that it is not. That statute undoubtedly applies exclusively to bonds conditioned for the payment of money only, and I cannot say that this is such a bond. I agree in the observations that have been made with reference to writs of error. I am aware of the mischief that frequently results from the practice of bringing writs of error where there is really no error, and the Court are always anxious to keep a jealous eye upon the conduct of defendants in such cases, and to prevent, as far as the law will allow, the injustice that is too often worked to plaintiffs by this course of proceeding.

(*a*) Made perpetual by 22 & 23 Car. 2. c. 4.

1823.

FLANAGAN v. WATKINS.

But it is here positively sworn, that there is error upon the record, and that the writ of error is not prosecuted for delay, and we have therefore a mere question of law to decide, namely, whether this is a bond within the meaning of the statute of *James*. In an old case of *Spinks* v. *Bird* (a), where in an action of debt on bond, conditioned for performance of covenants, the defendant craved oyer, and then entered nil dicit, and judgment of default was entered by leave of the Court; upon writ of error brought, it was held, that the matter of bail was properly examinable upon affidavit, and that the bond being conditioned for performance of covenants, bail ought not to be required. The same rule has also been laid down in a much more recent case of *Bennett* v. *Aylett*, which was decided in this Court in *Trinity* Term, 32 *Geo.* 3, but which has not, I believe, been reported. Now is this a bond for the payment of money only? What does the condition say? It is an indemnity not only against the payment of the annuity, but against "all actions, suits, loss, costs, charges, damages, and expences whatsoever, which should or might be brought, carried on, or prosecuted against, or that the plaintiff, his heirs, &c. should or might bear, pay, sustain, &c." The plaintiff might have been sued upon the original indenture, suffer a verdict, and have execution thereon sued out against him. Would not the money so paid by him have been made costs and damages within the terms of the indemnity, and might he not have sued the defendant upon it to recover it? Most certainly he might, and that circumstance at once clearly proves that the bond is conditioned for something besides the mere payment of money. I am therefore of opinion that this case is not within the statute, and consequently the rule must be discharged.

HOLROYD, J. concurred.

(a) 1 Barnes, 72.

BEST, J.—By the common law the defendant was never required to put in bail upon bringing a writ of error, and for this reason, that the writ was not allowed as a mere matter of course, but only when there was some evident and important ground for it. In more modern times, the practice became general and a matter of course, and has too frequently been resorted to for the mere purpose of delay and injustice. To prevent the injury which thus too often arose to plaintiffs, the statute of *James* was passed, but that statute has by no means an universal application; the cases to which it is meant to apply are specified upon the face of it, and the present is certainly not one of those cases. The words are "for the payment of money only," and what do those words mean? I think they mean a positive security for a certain and specified sum, and an absolute obligation to pay that sum at all events. Now an indemnity bond does not satisfy that definition. It is not an absolute engagement to pay; there is no specific sum secured; there is no certainty that any sum will ever become payable; it is a mere guaranty to reimburse the obligee for any loss or inconvenience that he *may* sustain. The case in *Strange* and *Wilson* is quite decisive to shew that such a bond is not a bond for the payment of money only, and the case in *Levinz* and *Keeble*, which has been cited in support of the rule, does not appear to me to support a contrary position, or to be in substance distinguishable from the former. That was a bond conditioned for the payment "of so much money as *A. B.* should declare to be due upon account;" id certum est quod certum reddi potest; the bond was for the payment of money, of a sum not then ascertained, but which would certainly, at some future time, become ascertained and fixed; and therefore in fact it was a bond for the payment of money within the scope and meaning of the statute. The same argument applies to the bottomree bond, and to the other cases that have been referred to. I am, however, decidedly of

1823.
FLANAGAN v. WATKINS.

opinion, that independent of any cases or authorities on the one side or the other, this is plainly not such a bond as the words of the statute describe, and therefore we are not called upon to require the defendant to put in bail in this case.

Rule discharged.

The Company of Proprietors of the LEEDS and LIVERPOOL Canal Navigation *v.* HUSTLER.

Where a canal act declared, "that no boat navigating upon the said canal which shall not be capable of carrying a greater burthen than twenty tons, or which shall not have a loading of twenty tons, shall be allowed to pass through any of the locks, unless the owner or navigator of such boat shall pay tonnage equal to a boat of twenty tons;" and it appearing that in no part of the act was a boat, per se, made liable to any toll, but that all the provisions as to tolls applied exclusively to goods conveyed on the canal:—Held, that the clause in question was confined to boats carrying *some* loading, and did not attach upon an *empty* boat passing the locks, reversing the decision in 2 B. & A. 66.

ASSUMPSIT for tolls and tonnage for the passage of certain boats of the defendant along the canal navigation belonging to the plaintiffs. Plea, Non assumpsit. At the trial before *Park*, J. at the *Lancashire* Lent Assizes, 1820, a special verdict was found, for the consideration of the Court, stating the following facts:—

The defendant is proprietor or lessee of certain coal mines at *Orrell*, in the county of *Lancaster*, between *Wigan* and *Newborough*, and of boats capable of carrying a greater quantity than twenty tons. The defendant shipped on the river *Douglas*, in one of these boats, forty tons of coal, which went along the part of the *Douglas* navigation between *Wigan* and *Newborough*, (where the *Douglas* joins the *Leeds* and *Liverpool* Canal) and along the *Leeds* and *Liverpool* Canal to *Liverpool*, where the defendant paid the appropriate rates. The distance to *Newborough* from the place of shipment is between three and four miles, in which there are two locks, and the distance from *Newborough* to *Liverpool* is between twenty-seven and twenty-eight miles, in which there are no locks. The boat returned from *Liverpool* empty (except that

there was a person on board to navigate her, and the necessary food and apparel and bedding of such person) for the purpose of reloading, and on her arrival at the first lock, called *Abley* lock, on the *Douglas* navigation, about two miles from *Newborough*, the plaintiffs demanded tonnage for her passing that lock, and refused to permit her to pass without payment thereof.

Before the agreement after mentioned, a dispute had arisen between the plaintiffs and Messrs. *Hollinshead*, respecting the rate of tonnage to be paid in respect of laden, and empty boats respectively, passing to and returning from the place of unloading, on the navigation, and on that occasion the defendant, amongst other persons in the practice of using the canal, signed, by his agent, the following agreement:—

"We undertake to pay the Company of Proprietors, &c. the tonnage, rates, and duties of 3*s.* 9*d.* per ton for all coal, cannel, and cinders navigated in any boat or vessel belonging or used by us, or on our behalf, on the *Leeds* and *Liverpool* Canal and *Douglas* navigation, at the usual times and in the manner we have heretofore paid the same, until a decision of the Court of *King's Bench*, or other Court, shall decide that such rate per ton is not payable, and in that case we undertake to pay that tonnage which the Court shall decide we are liable to pay, and we also undertake to pay the tonnage claimed by the Company *on boats of less burthen than twenty tons, or which shall not have a loading of twenty tons on board*, which shall pass through any of the locks of the said Company, if the Court shall decide such tonnage is payable, which engagement is, however, so entered into without prejudice to the rights we are entitled to under the acts respecting the said navigation; and it is understood and agreed, that all such payments shall ultimately be settled for according to the determination of the Court, upon actions to be brought respecting the same."

1823.

The LEEDS and LIVERPOOL CANAL v. HUSTLER.

Upon the faith of this agreement, a boat of the defendant, *which was capable of carrying a greater burthen than twenty tons,* returned empty to *Orrell* through the said first lock, without making any payment to the plaintiffs, and in order to obtain the decision of this Court, an action for money had and received was brought by Messrs. *Hollinsheads,* against the plaintiffs, in which the question was, whether the boats of the plaintiffs in that action, passing upon the navigation through any lock, *not having a loading of twenty tons,* were liable to pay tonnage or not? and it was decided by the Court that a tonnage was payable for such boats (*a*), whereupon a verdict was entered for the defendants in that action.

The junction of the two navigations at a certain warehouse in *Wigan,* mentioned in an act of the 34 *Geo.* 3. had been completed, before the said tonnage was demanded for the said boat so returning, and when the same was completed, the rates on the *Douglas* navigation between *Wigan* and *Newborough* ought to be the same as those on the *Leeds* and *Liverpool* canal. The questions between the parties to the present suit are, first, whether the plaintiffs are entitled to tonnage for the passage of boats capable of carrying a greater burthen than twenty tons, but having a less burthen than twenty tons on board, returning along the *Leeds* and *Liverpool* canal and the part of the *Douglas* navigation, both, or either of them; if they are so entitled, second, whether the rate upon twenty tons is one penny halfpenny, one penny, one halfpenny, or one farthing per ton per mile; and, third, whether the rate is payable in reference to the number of miles on *both* the navigations, or on the *Douglas* navigation only, or without any reference to the number of miles, and on account of passing the first lock on the *Douglas* navigation. If the plaintiffs are not entitled to either of these rates on account of passing the said

(*a*) 2 Barn. & Ald. 66.

lock, then judgment is to be for the defendants. If the plaintiffs are entitled to tonnage on twenty tons, then the damages are to be as follows:—If the rate is one penny halfpenny per ton per mile, along *both* navigations, 4*l.*; if one penny per ton per mile, 2*l.* 13*s.* 4*d.*; if one halfpenny per ton per mile, 1*l.* 6*s.* 8*d.*; and if one farthing per ton per mile, 13*s.* 4*d.* If the rate is one penny halfpenny per ton per mile, along the *Douglas* navigation only, 5*s.*; and so in the same proportion to the different rates. If the plaintiffs are entitled to tonnage on twenty tons, without reference to miles on *either* navigation, but on account of passing the said lock only, then the damages to be at one penny halfpenny per ton, 2*s.* 6*d.*; and so in the same proportion to the different rates, and costs.

Tindal, for the plaintiffs, contended, in the first instance, that the agreement set forth in the special verdict precluded the defendant from entering into the consideration of the present case, but the Court, intimating an opinion that that agreement was not binding upon the defendant, he proceeded to argue the general question, and insisted that, by the construction to be given to the local acts, 6 *Geo.* 1. c. 10. 10 *Geo.* 3. c. 114. 23 *Geo.* 3. c. 47. and 34 *Geo.* 3. c. 94. upon which the question turned, a boat returning without a loading, under the circumstances mentioned in the special verdict, was liable to a tonnage duty to the extent of twenty tons, according to the number of miles which the boat had actually passed along *both* navigations. There was nothing unreasonable in this construction, considering the very great expence of water incurred in maintaining a navigation of such extent. This question had certainly become of much less consequence than it was when the case of *Hollinshead* v. *The Leeds and Liverpool Canal Company* was decided, because, since then the 59 *Geo.* 3. c. 10. had repealed the tolls on empty boats, and enacted in future a payment for such boats of 5*s.* at the first lock only for the

1823.

The LEEDS and LIVERPOOL CANAL v. HUSTLER.

whole length of the two canals. The claim now made was limited to twenty tons, and was for a smaller amount than was paid for boats going *to Liverpool*, whereas the expence of water occasioned by the empty boats returning *from* that place was greater than that arising from the passage of loaded boats going thither, upon the simple principle that an empty boat causes a greater loss of water in the lock than one loaded would do. It was clear from the language of the 6 *Geo.* 1. c. 10. s. 12, that the *Douglas* navigation which was projected by that statute was not intended to be thrown open to the public at large; the permission to use it was expressly confined to those persons who carried on a traffic, such as would be beneficial to the proprietors of the navigation. Then came the 10 *Geo.* 3. c. 114. by which the *Leeds* and *Liverpool* Canal was first directed to be made, by sec. 56 of which it was enacted, "that every boat *not capable of carrying a loading of twenty tons* should, upon passing a lock, pay a tonnage equal to a boat of twenty tons burthen," which was followed by the 23 *Geo.* 3. c. 47, by which the two navigations were consolidated, and by sec. 25 of that act it is declared, "that every boat *not having on board a loading of twenty tons,* should, upon passing a lock, pay a tonnage equal to a boat of twenty tons burthen." Now the boat in question was evidently within the scope of the latter of these clauses; for, although it was not a boat "not capable of carrying a loading of twenty tons," yet it most unquestionably was a boat "not having on board a loading of twenty tons." The defendant would contend that empty boats were not included within this provision. The answer to that was, that no other boats could be intended by this clause; for no other boats would be in the situation, and, under the circumstances, there provided for. No loaded boat would be passing the lock in that direction, because there is no market that way to which any cargo could be consigned, and no boat would be passing for pleasure or amusement, and indeed all boats of the latter description

are otherwise provided for. In every other statute relating to subjects of this nature, there is an express and plain provision that empty boats shall pass free of all toll; it is so in the *Barnsley* Canal Act, 33 *Geo.* 3; it was so in the *Thames* and *Severn* Canal Act, 53 *Geo.* 3; and it is so in all the turnpike acts. The silence of the legislature as to an exemption for empty boats was not without a meaning, and the construction now contended for seems the most reasonable.

Hollinshead, contrà, contended, that an empty boat of the description in question, was on its return exempt altogether from a mileage or any other duty. This was a necessary inference resulting from the acts upon which the question arose. Looking through the various provisions therein contained, it would be found that the tolls were payable only in respect of the *cargoes*, and not in respect of the boats themselves. Not a single clause was to be found in which the boat, per se, was an object of rate. The whole scope of these statutes was to impose the rate upon the cargoes only; for which the legislature prescribed a specific scale of tolls applicable to each description of commodity. If then the rate was payable on the cargo only, it followed as a consequence that the boat per se was not in any respect rateable. It was manifest from the clause under immediate consideration, that the case of a loaded, and not an empty boat, was in contemplation, and that clause must be construed in reference to the tonnage clause in the preceding part of the act, which imposes the toll on loaded boats only. The absence of an exceptive clause in favour of empty boats would not help the plaintiffs' argument, because it was unnecessary to introduce such a clause, inasmuch as they were not included in the original liability. To give any effect to the plaintiffs' claim, it must be shewn that the legislature had, in the first instance, made the empty boat liable to toll. If this was not shewn, then no forced

1823.

The Leeds and Liverpool Canal v. Hustler.

construction would avail against the defendant. By what scale of rates were boats per se to be made liable? The statutes pointed out none. With respect to different descriptions of goods a scale of rates was indeed framed, but none as to boats, and therefore it would be impossible to determine the amount of rates payable on the empty boats, supposing them chargeable. No reason could be suggested why they should be liable to one rate more than another, and unless some rational mode was pointed out consistent with the provisions of the statutes, it followed that an empty boat was not liable. After calling the attention of the Court in detail to the provisions of the different statutes passed, for regulating both navigations, and pointing out the inconsistency of the construction contended for on behalf of the plaintiffs, he insisted that the defendant was entitled to judgment.

Tindal was heard in reply, and re-urged that the construction of the clause, upon which he had previously relied, was the true view to be taken of the question.

Bayley, J.—If in any decision of the Court in which I have concurred I have taken a wrong view of the particular subject, I feel no regret in admitting my error, and I hope my mind receives no prejudice from having stated on a former occasion what my opinion then was. In every case submitted to my consideration, my opinion is formed upon the best attention I can give to the arguments I have heard; but if upon a subsequent argument I am satisfied that my previous judgment was wrong, I think it my duty to confess my error, and in doing so I trust I do myself no discredit. After the argument which has now taken place, I am inclined to think that the former decision in *Hollinshead v. The Leeds and Liverpool Canal Company* was wrong; and we should have desired to have this case argued a second time, in order that we might have the benefit of my

Lord Chief Justice's judgment, but as the case comes before us on special verdict, and as the probability is that the parties would be desirous (whatever the opinion of this Court might be) of taking the opinion of a court of error, we think it more advantageous to pronounce our judgment upon the present argument. The principal grounds upon which I have changed the opinion I formerly entertained upon this question are, first, the enormous amount of the toll claimed; and, second, that it is proportioned not to the loss of water occasioned by the passage through the lock, but to the length of the voyage, which seems to me an unjust criterion. The rate imposed by the 10 & 23 *Geo.* 3. is clearly upon the article conveyed, and is varied in proportion to the nature and the value of the different sorts of goods passing along the canal. The 55th section of the former of those acts gives to all mankind a liberty to use and navigate the canal for the purpose of trade, &c. This is the privilege clause, and undoubtedly the literal construction of it would apply to loaded boats only, and not to such as were passing empty in pursuit of a cargo, or returning home without one. But in my view of that clause such a construction would be much too narrow and confined to meet the intention of the framers. "For the purpose of trade" are comprehensive words, and I think a boat returning empty for the purpose of reloading and returning with another cargo, is properly within their beneficial operation. Then by the succeeding section, upon which the section immediately under consideration is evidently modelled, a maximum of rate is established. The principle held in view when that section was framed, I take to be, that it was not worth the while of the proprietors to open the lock for a smaller vessel than one of twenty tons, and therefore that for every vessel having a less cargo than twenty tons, a rate as for twenty tons should be paid. But I cannot think that boats having no cargo at all on board, were meant, or ought to be comprehended within that principle. The rate is uni-

1823.

The Leeds and Liverpool Canal v. Hustler.

versally imposed upon the cargo, not upon the boat, and therefore only attaches when the boat carries some cargo, though less than twenty tons. Then comes the clause in question, which is varied from the former in this respect, that boats *capable of carrying*, but not in fact carrying twenty tons, shall pay equally with those which do carry that tonnage. So that the result is, that both boats, which cannot from their size, and those which can, but in fact do not, carry twenty tons, shall pay the same toll as boats having twenty tons on board are to pay. I am therefore of opinion that this clause does not apply to empty boats, and that in order to bring a boat within its operation, she must have *some* loading on board. It is to be remembered that the effect of the clause is to cast a burthen upon the public for the benefit of a few individuals; it is therefore to be construed liberally on the side of the public; and it was the duty of the company, if they really contemplated the grant of the particular toll now claimed, to have caused the insertion of words in the statute, which would have plainly and expressly imposed it. That they have not done, and therefore I am of opinion that the boat in question was not liable to pay any toll, and consequently that the defendant is entitled to our judgment.

Holroyd, J.—The discussion which this case has received to-day has perfectly satisfied my mind that the former decision of the Court was erroneous. On that occasion the Court was influenced by the supposed injury arising to the company from the trouble and loss of water occasioned by the empty boat in passing the lock, but I am now convinced that that was an improper criterion for the estimation of the toll. The toll is in every instance imposed not on the vessel, but on the cargo. By the former statute no boat was liable to pay toll unless she had a cargo on board, and the boat in question therefore is clearly within the privilege and exemption clause, unless the last statute ex-

1823.

The LEEDS and LIVERPOOL CANAL v. HUSTLER.

pressly imposes a toll upon boats in her situation. Now, does it do so? I am clearly of opinion that it does not. It imposes upon boats capable of carrying twenty tons, and not having twenty tons on board, the same toll as is payable by boats having twenty tons on board. I think that cannot mean an empty boat, but that in order to be liable upon that clause, the boat must have *some* loading on board. The clause does not affect to create a new toll, but only to increase those already existing; but if it is to comprehend empty boats, it clearly has the effect of creating a new toll. I also think that an empty boat may be within the privilege clause, and that the boat in question was; she was returning homeward to procure another cargo, and therefore she was navigating expressly "for the purpose of trade." For these reasons, I am of opinion that this boat was not liable to pay any toll, and therefore that we are bound to give judgment for the defendant.

BEST, J., concurred.

Judgment for the defendant.

DOE, d. MARQUIS of ANGLESEY v. ROE.

Landlord enters into an agreement with tenant, on 2d *January*, 1815, to grant the latter a lease for eight years of certain premises, the agreement to take effect from the 10th *October*, 1814, from which time tenant had been in possession, yielding 2*s.* 6*d.* yearly, and in case he held over after the term, he was to pay 40*s.* per diem for every day he retained possession. The lease was never granted. At the expiration of the term tenant held over, after having been served with a nine months notice, to quit at the end of the year for which he held, which should first happen after the expiration of half a year, from the date of the notice. He was then served with a written demand of possession, and the same paper notified to him, that if he did not yield quiet possession, an ejectment would be brought: Held, 1. That the tenant was not to be treated as a tenant from year to year; and, 2. That the demand of possession was sufficient notice within 1 *Geo.* 4. c. 87. so as to entitle the plaintiff to the benefit of the undertaking and security required by that statute.

JEREMY, in *Hilary* Term, had obtained a rule, calling upon the tenant in possession, *William Brown*, to shew cause why he should not give the undertaking, and enter into the security required by 1 *Geo.* 4. c. 87. It appeared

DOE v. ROE.

by the affidavits upon which the rule was obtained, that the plaintiff and *Brown* had entered into a written agreement, bearing date 2d *January*, 1815, by which the latter was to have a lease of the premises in question for a term of eight years, commencing from the 10th *October*, 1814, at the rent of two shillings and sixpence, payable quarterly, and a further rent of forty shillings daily, for every day that he should withhold the possession after the expiration of that term. The premises consisted of a cottage and garden, and were in the occupation of *Brown*, when this agreement was made. No lease was ever granted. The term expired on the 10th *October*, 1822, and on the 4th *February* in that year a notice was served upon him to quit at the end of the year for which he held, which should first happen after the expiration of half a year from the notice. The yearly rent of two shillings and sixpence was regularly paid from *October* 1814, to *October* 1821, inclusive. *Brown* continued to hold the premises after the expiration of the term, and on the 13th *December*, 1822, a *verbal* demand of possession was made upon him, and also a written demand, dated a few days previously, in the following terms:—"You are hereby required to delivered up the peaceable and quiet possession of the premises, &c. held and occupied by you as tenant thereof, to me, your term, interest, and tenancy therein having expired or been determined, in default whereof I shall forthwith proceed by action of ejectment," &c. After this notice he continued to hold over, and the action was brought.

Manning now shewed cause, and took two objections. First, that there had been no "demand in writing," of the possession within the meaning of the statute; and, second, that *Brown* clearly held as tenant from year to year, whereas the statute applied only to cases of lands, held under an agreement in writing. The written paper which had been served upon the tenant was in substance no more than a

1823.

Doe v. Roe.

notice of action, and at all events was not such a formal and absolute demand of possession as the Legislature seemed to intend; it ought to have been a demand of possession, and nothing else; but this was mixed up with other matters. Then this was clearly not a holding under an agreement; the tenant was in possession when the agreement was made; no lease was ever executed; his tenancy remained unaltered in its nature; the mode in which his rent was paid continued the same; and the notice to quit was expressly applicable to a yearly tenancy. All these circumstances concurred to shew that though there had been a design to grant him a term in the premises, that design had never been accomplished, and that he continued during all the time, not only in point of fact, but also clearly in the understanding of both parties, a tenant from year to year. He cited *Doe*, d. *Bradford* v. *Roe* (a).

Jeremy, contrà, having referred to *Doe*, d. *Phillips* v. *Roe* (b), and *Doe*, d. *Cardigan* v. *Roe* (c), was stopt by the Court.

Per Curiam.—The written notice of action contains a good demand, in writing, of possession within the meaning and object of this act of Parliament. There is a demand in writing to deliver up the possession; that is all the statute requires, and the subsequent notice of action cannot invalidate or destroy the effect of the previous demand. This is also manifestly a holding under an agreement for a lease; the new tenancy was to commence from a day already past, and was to end at a day then fixed, and when that day arrived, notice to quit was given according to the terms of the agreement. There is therefore no weight in either of these objections, and we must make the

Rule absolute.

(a) 5 Barn. & Ald. 770. (b) Ante, vol. i. 433. (c) Id. 540.

1823.



EDMEADS and Others *v.* NEWMAN.

Two several banking firms carrying on business respectively in the same country town, were in the habit of exchanging notes and securities with each other, and settling their balances by a prescribed mode. One of the firms became bankrupt, and at the time of the act of bankrupt, each firm had in their possession notes and securities of the other to nearly the same amount. The provisional assignee of the bankrupt firm being apprized of this fact, presented and obtained payment of the notes of the solvent firm, partly at their bank, and partly of their agents in *London*, who did not know the situation of the parties: Held, that the solvent firm might sue the provisional assignee for the amount of the notes in assumpsit, for money had and received, though the conduct of the latter savoured of tort.

ASSUMPSIT for money had and received. Plea, Non-assumpsit. At the trial before *Ellenborough*, C. J., at the *London* adjourned Sittings after *Michaelmas* Term, 1816, the plaintiffs were nonsuited, under the learned Judge's direction, but in the following Term a rule nisi was obtained for a new trial, and upon shewing cause against that rule, the Court directed the facts to be stated in the following case for the opinion of the Court.

The plaintiffs before and on the 6th *March*, 1816, carried on business in co-partnership as bankers at *Maidstone*, in *Kent*, under the firm of "The *Maidstone* Bank." Before the 17th *February*, 1816, *E. Penfold*, *J. Springet*, and *W. M. Penfold*, carried on business in co-partnership as bankers at *Maidstone*, under the firm of "The *Kentish* Bank;" and on that day their partnership was dissolved, and the following notice was published in the *London* Gazette, and the *Maidstone* paper of the 20th of that month. "17th *February*, 1816. Notice is hereby given that the co-partnership between us, *E. Penfold*, *J. Springet*, and *W. M. Penfold*, trading under the style of "The *Kentish* Bank," at *Maidstone*, in the county of *Kent*, is, as to the said *J. Springet*, dissolved by mutual consent, and that in future the said business will be carried on by the continuing partners of the said bank. *E. Penfold*, *J. Springet*, *W. M. Penfold*." The plaintiffs were acquainted with this notice on or about the said 20th *February*. From the dissolution, until the 7th *March*, 1816, the business of the *Kentish* bank was carried on under the same firm of "The *Kentish* Bank." Messrs. *Penfold* did not issue any new notes,

1823.

EDMEADS v. NEWMAN.

but continued to re-issue and to receive in payment the notes which had been previously issued in the names of themselves and Mr. *Springet*. For many years before, and after the dissolution of partnership, till Messrs. *Penfold* stopt payment as after mentioned, the two banks daily exchanged the checks and drafts, which they held upon each other, without either receiving the balance in a payment; but if the checks, &c. held by the one, exceeded in amount those held by the other, the bank from which the balance was payable, gave to the other a memorandum of exchange, to be produced and allowed at the next general exchange of their respective notes and checks. This was usually done twice or thrice a week, but whenever the balance exceeded 100*l.* upon a general exchange, it was immediately paid by a draft or bill on *London*, to the bank to whom it was due; otherwise it was carried on by a memorandum to the next general settlement. The defendant was a partner in the firm of *Ramsbottom* and Co. bankers, of *London*, who were the *London* agents, first of Messrs. *Penfold, Springet,* and *Penfold,* and afterwards of Messrs. *Penfold;* Sir *P. Pole,* and *Co.* bankers, of *London,* were and are the *London* agents of the plaintiffs. On the 6th *March,* 1816, Messrs. *Ramsbottom* and *Co.* stopt payment, and Messrs. *Penfold* continued to pay during the usual banking hours of that day, but did not open their bank the next morning, or afterwards. On the evening of that day Messrs. *Penfold* had verbal information of the stoppage of Messrs. *Ramsbottom.* At the close of that day the relative situation of the plaintiffs and the *Kentish* bank was this:—The *Kentish* bank held notes of the plaintiffs to the amount of 610*l.*, of which one hundred and forty 1*l.* notes were payable at the plaintiffs *only*, the rest were payable there and at Sir *P. Pole* and *Co's.*, and they had *all* been received by Messrs. *Penfold* after 1st *March,* 1816. They held also a memorandum of exchange for 82*l.*, a check by *T. Ellis,* on the plaintiffs, for 7*l.*, and another, by *Tapsfield,* for 4*l.*;

1823.

EDMEADS *v.* NEWMAN.

in all 703*l.* The plaintiffs on that day held *R. Miller*'s check upon Messrs. *Penfold*, of 5th *March*, 1816, addressed to *Penfold, Springet*, and *Penfold*, and received on the day of its date for 35*l.* 14*s.* Another, in all respects the same, for 35*l.* 15*s.*, *W. Sowerby*'s check, of 4th *March*, 1816, in all other respects the same, for 10*l.* 0*s.* 10*d.*, *J. Miller*'s check, of 2d *March*, 1816, in all other respects the same, for 50*l.*, a memorandum of exchange for 165*l.* 1*s.* 6*d.*, and notes of *Penfold, Springet*, and *Penfold*, payable both at their bank and at *Ramsbottom* and *Co's.* and received by the plaintiffs after the 17th *February*, 1816, for 429*l.*; in all 725*l.* 11*s.* 3*d.* The memorandum held by the *Kentish* bank was in this form; " Received   *March*, 1816, of Messrs. *Penfold* and *Co.* the sum of eighty-two pounds for *Edmeads, Atkins*, and *Tyrrell*;" signed by one of their clerks. That held by the plaintiffs was in this form; " *Kentish* Bank, *March* 6th, 1816. Received of Messrs. *Edmeads* and *Co.* one hundred and sixty-five pounds 1*s.* 5*d.* on account. For *Penfold* and *Penfold*; *W. Master*." The notes and securities held by the plaintiffs, were all received after the 17th *February*, 1816. On the 12th *March*, 1816, Messrs. *Penfold* committed an act of bankruptcy, and a commission issued against them, under which they were declared bankrupts. Mr. *Springet* committed an act of bankruptcy about a fortnight after, and the first commission was then superseded, and a joint commission awarded against him and Messrs. *Penfold*, which was in progress at the time this action was brought. The defendant having been appointed provisional assignee under this commission, went to *Maidstone* on the 9th *April*, 1816, and demanded of *Robert Hazell*, the managing clerk of Messrs. *Penfold*, the notes, &c. of the plaintiffs, amounting to 703*l.* *Hazell* told him that the plaintiffs had nearly the same amount of notes, and other securities, of the *Kentish* bank, and that the plaintiffs notes, &c. had been set apart to be exchanged with the *Maidstone* bank by proper persons, but they were not set apart, or made into a separate

parcel before the bankruptcy, though *Hazell* swore that in his own mind he had put them apart for the purpose of exchange. The defendant took the notes and securities into his own possession, and presented notes amounting to 140*l.* to the plaintiffs at *Maidstone*, who duly paid the same, and others amounting to 470*l.* at the house of Sir *P. Pole* and *Co.* the *London* bankers and agents of the plaintiffs, who, being ignorant of the circumstances, paid the same, and debited the account of the plaintiffs with the amount thereof, after which, and before the commencement of this action, the plaintiffs demanded of the defendant a return of the said money, and the defendant refusing to return the same, this action was brought. The question for the opinion of the Court is, whether, under all the circumstances of the case, the defendant is legally entitled to retain the money so obtained. If they are of opinion that the defendant is entitled, then a nonsuit to be entered; otherwise the rule for a new trial to be made absolute.

Chitty, for the plaintiffs, was stopped by the Court.

Parke, contrà. Assumpsit for money had and received will not lie under the circumstances of this case. If the plaintiffs have any remedy it is by a special action on the case for a deceit, inasmuch as the defendant, if he had no right to the money, must have obtained it by tortious means. Upon this principle the nonsuit had proceeded at the trial, and it seems to have been well founded. Supposing, however, that the plaintiffs could have any right of action, it would not accrue until they had placed the defendants in statu quo, by delivering up the securities which they held against the *Kentish* bank. If the plaintiffs had any just cause for saying that the defendant had deceived them, then they ought to have made a tender of those securities, and after putting the defendant in the same situation as he would have been before, an account might

1823.

EDMEADS v. NEWMAN.

be taken between the parties, and the balance, if any, paid over. Until this had been done, the plaintiffs had no right of action. The defendant, by this proceeding, is placed in a most disadvantageous situation, because, if the plaintiffs succeed in the present action, what is there to prevent them from circulating these notes again, and making the defendant liable for the amount, or proving them under the commission against *Penfold, Springet,* and *Penfold?* The restitution of these securities was a condition precedent, and until that had been performed, money had and received would not lie. But there is another ground upon which this action cannot be maintained. Here are sets off in different rights. Upon balancing the accounts, the plaintiffs may have one ground of claim against *Penfold, Springet,* and *Penfold,* and another against *Penfold* and *Penfold.* It may be true that all the notes were received by the plaintiffs after the dissolution of partnership between *Penfold* and *Springet,* but still the case did not find that they were re-issued by the *Kentish* bank after that period. Under such circumstances, and supposing this action maintainable, how is it to be determined for what amount the plaintiffs are entitled to recover?

BAYLEY, J.—I am of opinion that the nonsuit must be set aside, and a new trial granted, or some other arrangement made between the parties to meet the justice of the case. At the time when the *Kentish* bank failed, they had in their possession certain securities against the *Maidstone* bank, and the latter had also in their possession certain securities against the former. Upon the adjustment of all those securities (considering the *Kentish* bank as one entire firm, and not making any distinction between the securities issued by them), there was a balance of 22*l.* in favor of the *Maidstone* bank. The defendant was the provisional assignee of the *Kentish* bank, and he had no rights except such as the bankrupts had. Now, under the 5 *Geo.* 2.

c. 30, the balance between the two accounts was the only real debt, and therefore considering the whole as constituting one entire agreement at that time, there was no debt due from the *Maidstone* to the *Kentish* bank, but there was a debt of 22*l*. due from the latter to the former. The defendant in his character of provisional assignee, holding in his possession 703*l*. as against the *Maidstone* bank, applied to their managing clerk, and obtained these securities. He is informed at the time by the clerk, that the *Maidstone* bank hold securities nearly to the same amount against the *Kentish* bank. After being apprised of that fact, the defendant should have understood (and it was his duty so to do), that the balance between the two accounts only was the debt, inasmuch as he had no rights beyond those which the *Kentish* bank had at first; but notwithstanding this, he obtains payment of part of the securities from the *Maidstone* bank, and of part from the banking-house of Sir *P. Pole* and *Co.* their agents in *London*. In this respect it seems to me, he acted contrary to his rights as provisional assignee. He was not at liberty to receive any part of that money, and having exceeded his duty, I think he is liable to refund it in an action for money had and received. It is contended that this should have been an action on the case for a deceit, and that at all events the plaintiffs were not entitled to bring an action for money had and received until the securities in their hands were delivered up, and the rights of the parties ascertained. I think otherwise. This is one of those cases in which the party may waive the benefit resulting from an action in tort, and bring assumpsit, and as to waiting until the securities were exchanged, I think the plaintiffs were under no obligation to do that, inasmuch as the defendant was not entitled to put himself in a better situation by obtaining this money than he would have been in before. It seems to me, therefore, that money had and received is the proper action. I do not see what benefit could result to the *Kentish*

1823.

EDMEADS v. NEWMAN.

bank from having the securities pro tanto, delivered up to them, because if there were any claim made upon them, it would be successfully resisted by shewing that the securities had been in possession of the *Maidstone* bank; and consequently they could not be damnified. Whatever the balance between the two accounts is, I think the defendant is liable to refund it in this action. It is suggested that there may be a difficulty in ascertaining the amount for which the plaintiffs are entitled to recover, on account of the different rights involved; but it is not necessary for the Court to give any opinion upon that point, because it is not properly presented to their consideration. The question is, whether there should be a nonsuit or not. If there should be different claims against the *Kentish* bank, before and after *Springett* retired from the firm, they may be very easily ascertained, and the result, whatever it is, will be the sum which the plaintiffs are entitled to recover. I think the plaintiffs were nonsuited too expeditiously, because they were clearly entitled to recover something.

HOLROYD, J. was of the same opinion.

BEST, J.—I think this is a very equitable action, and is properly conceived in point of form.

Rule absolute for a new trial.

CARTER, Assignee of ABITBOL *v.* ABBOTT and Others.

The assignee of a bankrupt brought an action upon the 9 *Ann.* c. 14. to recover back money lost by the bankrupt to the defendants at the game of rouge et noir. To prove the loss of the money, the bankrupt who had been certificated, was called as a witness, and in order to render him competent, the bankrupt released the assignee of all claim upon the surplus fund, if any; all the creditors who had proved, released the bankrupt from all future claims, and the assignee (who was not a creditor), executed a like release to the bankrupt:—Held, 1. That these several releases restored the bankrupt's competency. 2. That after the expiration of more than a year from the date of the commission, it was to be presumed, that all the creditors had proved, and that a release signed by all who had proved, was binding as a release by every one of the creditors; and 3d, That the assignee's title to sue was not destroyed by the release he had executed, inasmuch as it only extended to the bankrupt's future estate.

THIS was an action of debt upon the statute 9 *Ann.* c. 14, by the plaintiff, as assignee of the estate and effects of *Moses Abitbol*, a bankrupt, against the defendants, to recover a sum of money lost to them at play by the bankrupt. At the trial before *Abbott*, C. J. at the *Middlesex* adjourned Sittings after *Trinity* Term, 1822, a verdict was found for the plaintiff for the sum of 1610*l.* subject to the opinion of the Court upon the following case:—

The plaintiff is assignee of the estate and effects of *Moses Abitbol*, a bankrupt. The commission was dated 9th *January*, 1821; the act of bankruptcy was committed in *August*, 1820; the bankrupt obtained his certificate 7th *September*, 1821. The action was brought to recover the sum of 2285*l.* being the amount of money lost by the bankrupt to the defendants at the game of rouge et noir in the month of *November*, 1820. To prove the loss of the money, the bankrupt was called as a witness on the part of the plaintiff, when the defendants' counsel objected to his competency, upon the ground that if the case opened by the plaintiff's counsel, and which the bankrupt was called to prove, was true, his certificate under the commission was void, and his future effects liable to the payment of his debts; whereupon the counsel for the plaintiff produced and proved a release, dated 15th *June*, 1821, by the bankrupt to the plaintiff as assignee, of "all surplus and allowance under the commission;" a further release, dated 23d *January*, 1822, and executed by the creditors

1823.
Carter
v.
Abbott.

who had proved under the commission, including the petitioning creditor, to the bankrupt, of "all actions, causes of action, &c. which they, the creditors, or any of them, then had against the said bankrupt, or his lands, tenements, goods, and chattels, or any part thereof, at law or in equity." A third release, dated 21st *June*, 1822, executed by the plaintiff, as assignee (who was not a creditor, and consequently had not executed the second release) to the bankrupt, of "all claims upon his property, estate, and effects, already acquired, or hereafter to be acquired, subsequent to the allowance of his certificate." It was then objected, on the part of the defendants, that notwithstanding these releases, the bankrupt was not a competent witness, and that the effect of the releases was to destroy the plaintiff's right to maintain the action. The Lord Chief Justice received the evidence, subject to the opinion of the Court upon this case, and a verdict was found for the plaintiff for 1610*l*. The questions for the opinion of the Court are, first, whether the bankrupt was a competent witness; and second, whether the instruments before-mentioned had destroyed the capacity of the plaintiff to sue in this action. If the Court shall be of opinion, either that the bankrupt was not a competent witness, or, that the right of action was destroyed, a nonsuit is to be entered; otherwise the verdict is to stand.

Wilde, for the plaintiff. Upon the first branch of this case, namely, the competency of the bankrupt, as a witness on the part of the plaintiff, the main question seems to arise upon the release by the creditors to the bankrupt, and appears to be, whether there were sufficient grounds for presuming that *all* the creditors had joined in that release, and if not, whether the onus lay upon the defendants to shew that there were other creditors in existence, who had not joined in it. Now legal, like moral, presumption, must depend upon the particular circumstances of the case

upon which it is built, and the circumstances of this case are amply sufficient to found the presumption, that all the creditors had executed the release. All the several public meetings, and all the important acts, incident to a commission of bankruptcy, had taken place; the choice of assignees; the final examination of the bankrupt; the allowance of the certificate; and from the beginning to the close of the transaction, no shorter an interval than eighteen months had intervened. Surely after such a lapse of time, and such a recurrence of opportunity to come forward, the non-appearance of additional creditors, in the absence of proof of their existence, is a reasonable ground for presuming that they did not, in fact, exist. Then, if the evidence was indecisive, the defendants were certainly the persons upon whom it was incumbent to put the fact beyond doubt. To them it would have been easy so to do, for a single question put to the bankrupt on cross-examination, would have established the fact one way or the other; but to the plaintiff such a course presented insuperable difficulty, for he could not examine the bankrupt to such a fact, because he was bound in the first instance to render him competent, which, upon the record, he primâ facie appeared not to be. Then upon the second branch of the case, the question is, whether these releases have rendered the bankrupt a competent witness, so as necessarily to destroy the capacity of the plaintiff to sue in this action? The answer to that question is short and conclusive. The money sought to be recovered by this action is no part of the effects of the bankrupt; he has no interest in it; it is the property of the assignee, and belongs to him as a trustee for the creditors at large.

The Court stopped him, and called upon

F. Pollock for the defendants. The attempt to make the bankrupt a witness in this case is an anomaly upon the face

1823.

CARTER v. ABBOTT.

of it. It is an attempt to make a person a witness whom the law expressly forbids to be a witness, and to give a bankrupt his certificate whom the law has in terms disqualified for receiving it; and both those objects, if accomplished, will have the effect of letting in his testimony for his own benefit only. It is admitted that upon the record he is incompetent, and it is the duty of the party who stands in need of his evidence to remove his incompetency; the defendants need him not, and are not therefore bound to qualify him; the plaintiff does need him, and upon him therefore the burthen ought to be cast. What is the effect of the three releases which were produced at the trial? The first debars the bankrupt from all claim upon the surplus and allowance; and the last relieves him from the claims of his assignee; but as to the second, it affects indeed to release him from the claims of *all* his creditors, but what was the evidence that it did so? No more than this; that all the creditors who had proved under the commission had executed the release; but there was not a particle of evidence to shew that those were all his actual existing creditors. But it is said there is a reasonable presumption that all the creditors had proved. The facts of the case contradict this argument. Every day's practice in bankruptcy proceedings shews, that until a dividend is declared, the bulk of the creditors do not come in to prove; for till that moment arrives they have no motive for so doing. In this case no dividend was ever declared; why then should the creditors come in and prove, and how does the fact of their not proving lead to the inference that they are not in existence? Then it is said that the plaintiff had no means of shewing that there were no outstanding creditors. He had the best means in the world. He might have produced the bankrupt's books; he might have examined his clerks and those who had dealings with him; and from those sources it would instantly have appeared who were his creditors, and whether all those creditors had executed the release. Upon

this part of the case, therefore, it is clear that the bankrupt was not a competent witness upon any reasonable presumption to be raised upon the facts; and that it was incumbent on the plaintiff to render him competent in the first instance before his testimony could be received at all. Then, secondly, if these releases were sufficient to render the bankrupt a competent witness, they necessarily destroyed the plaintiff's capacity to sue in this action. The assignment to the plaintiff under the commission vested the whole of the bankrupt's property in him; he became clothed with the legal interest for the benefit of the creditors, and therefore no act of theirs by way of release to the bankrupt could affect his legal rights; he stood in the situation, and must be regarded in the light of any other trustee; but for what purpose and for whom was he trustee? All the purposes of this commission were already answered; there was no existing interest left. The terms of the plaintiff's release were as ample as it was possible for language to express; he released "all claims upon the bankrupt, his property, estate and effects, already acquired, or hereafter to be acquired." Then in what or whose right could he now sue? For what purpose, or for whose benefit would he recover in this action? There are no debts remaining to be paid; for this release has extinguished them all. He can be suing for the bankrupt only, and that by law he is forbidden to do; for the statute 1 *James* 1. c. 15. s. 15. expressly enacts, that under such circumstances the bankrupt shall bring the action in his own name; and the result is, that the bankrupt is in fact the plaintiff in this action, and is bringing forward his own testimony in support of an attempt to take money out of the pocket of the defendants and put it into his own. From the moment that the plaintiff had signed his release, he had parted with his right to sue as assignee, because he had resigned the claims of those in whose name and for whose benefit alone he was ever entitled to sue in that character. Upon this part of the case, therefore, it is clear

1823.

CARTER v. ABBOTT.

that the present plaintiff cannot maintain the action; and, upon both questions, it follows that the judgment of the Court must be for the defendants.

BAYLEY, J.—Two questions are raised for our consideration in this case; first, whether the bankrupt was properly admitted as a witness at the trial; and, second, whether the plaintiff's right of action was destroyed by the releases given in evidence. With respect to the first I am of opinion, under all the circumstances, that the learned Judge who tried the cause had sufficient grounds for admitting the bankrupt as a competent witness. The bankrupt had obtained his certificate; his evidence had a direct tendency to shew that the certificate was void; and therefore in that point of view he was called expressly against his own interest. That was one circumstance which might naturally and properly weigh with the learned Judge on the side of his admissibility. Then he had given a release to his assignee of all surplus and allowance, which prevented his receiving any benefit from the increase of the fund, and so removed any interest he might be supposed to have in that respect. The bankrupt's evidence was of course calculated to increase the fund, and the increasing the fund might be a temptation to new creditors to come in and prove; but are we to presume that there are any such creditors in existence? If the certificate is valid, the bankrupt is so far a competent witness; if it is void, he is incompetent. There is an objection to him on the record; how is the plaintiff to remove it? By putting in the release by the creditors to the bankrupt. The language of this is very general, and it evidently purports to be executed by all the creditors who had proved. If there are other creditors behind, all the labour and pains that the bankrupt and the plaintiff have taken are rendered nugatory. But what is the fair probability arising from the facts? The commission is dated in *January* 1821, and the three usual meetings take place at the usual inter-

vals of time. Surely the probability is, that the creditors will come in and prove as soon as they can; a certain number do prove as soon as it is possible; and from that time down to *October*, 1822, no other creditor appears to prove, while all who have proved sign the certificate; and yet we are asked to presume that there are outstanding creditors. I think that would be too much; and that after such an interval the fair inference was that no other creditors existed, and consequently that there was a sufficient primâ facie case of competency. The maxim of law, "de non apparentibus et non existentibus eodem est ratio," seems to me fairly to apply in this case. If in fact there were other creditors, the defendants might easily have proved it out of the mouth of the bankrupt, who could not fail to know, and I think the onus probandi lay on them. Upon the whole therefore, I incline to think that the evidence was properly admitted. With respect to the second question I have a much more decided opinion; indeed, I entertain no doubt whatever upon it. It is said that the necessary effect of the release by the creditors to the bankrupt is to destroy the plaintiff's right of action, because from the moment that release was executed, the former ceased in effect to be creditors, and the plaintiff became functus officio, and was in fact no longer assignee. I cannot subscribe to this construction of the release. It is "of all claims upon the bankrupt, his lands, tenements, goods and chattels." What are *his* lands, tenements, &c.? Certainly not those of which he was possessed *before* his bankruptcy; for by the assignment they had become the property of the plaintiff. But he may hereafter acquire others, and to those future effects the release undoubtedly is meant to apply. The fair construction and sense then of this release, appears to me to be, *to* release from any claim of the creditors the *future* effects which the bankrupt may acquire, and not at all to affect those which have already passed to the assignee. In that view of the case, therefore, I am of opinion that the plain

1823.



CARTER v. ABBOTT.

tiff was fully entitled to maintain this action, and consequently that on both points raised, the judgment of the Court must be for the plaintiff.

HOLROYD, J.—I am of opinion that my Lord Chief Justice came to a right conclusion at the trial upon both points. I think, under the circumstances which were given in evidence, the bankrupt was a competent witness. His evidence might place him in a worse situation than he was in already, but could not possibly place him in a better, and if his testimony was calculated to avoid his certificate, he was clearly acting against his own interest. The bankrupt laws all concur in considering a commission of bankrupt as a mode of relief to the creditors, and therefore the presumption is, that all the parties intended to be relieved will come forward as soon as possible, and take the benefit provided for them, because, otherwise the act of a part by signing the certificate might bar the rest. In the present case the long interval which elapsed, without any other creditor appearing, very much strengthens this presumption, and the circumstances, taken altogether, seem to me quite sufficient, to warrant the conclusion that *all* the creditors had signed, particularly when the defendant, whose duty it was, and who had the power to prove the contrary, if the contrary were the fact, adduced no evidence against it. On the second point, I am clearly of opinion, that the release by the creditors did not bar the plaintiffs' right to sue. It is not a re-assignment of his former effects to the bankrupt, it is only a remission of all the claims upon those he may hereafter acquire. I cannot see how the plaintiffs' interest in the effects, or his right of action is at all affected by that instrument; the present action is against a debtor of the bankrupt, not the bankrupt himself, and is therefore a claim perfectly independent of the release and its operation. For these reasons I think the verdict for the plaintiffs ought to stand.

1823.

Carter v. Abbott.

Best, J.—Both these points are, in my judgment, so perfectly clear, that I can scarcely consider them arguable. All that could be done at the time of the trial to render the bankrupt competent, had been done; the question was, whether he had any interest remaining which made him still incompetent. I am of opinion that he had not; but that was a question for the learned Judge who tried the cause to decide; and even if he had left it as a question of fact to the Jury, it would have been his duty to tell them that the presumption was, that no outstanding creditors existed. This, I think, is the safe rule on such occasions. On the plaintiff's side all that could reasonably be expected from him was done; the defendant had it in his power to rebut that case, but he declined doing so, and his neglect made the presumption conclusive against him, and rendered the bankrupt a competent, because then, a disinterested witness. This argument may be illustrated by a simple and familiar example. It is proposed to give parol evidence of the contents of a written paper. For this purpose it is necessary to shew that the paper itself is lost. But how is this done? Is it necessary to shew that it is *impossible* the paper should be in existence? Certainly not. It is enough to shew by circumstances, that it is in all *probability* no longer in existence, and then the presumption follows that it is lost. It is said that the effect of our judgment in favour of the plaintiff will be to give the bankrupt his certificate where the law intended to withhold it. This is by no means correct. By law a certain proportion of the creditors have power to grant the certificate. The law no where says, that a bankrupt, under circumstances such as the present, is incapable of receiving from his creditors a release of his debts, and that is really all that our judgment will effect. With regard to the plaintiff's right to sue in this case, I fully concur with my learned Brothers in the opinions they have expressed, and I think the judgment on both points must be for the plaintiff.

Postea to the plaintiff.

HALL *v.* SMITH.

The member of a country bank signed for himself and partners notes, beginning with the words, "I promise to pay, &c."—Held, that he made himself severally liable upon the notes, and could not plead in abatement a joint liability with his partners.

ASSUMPSIT by the bearer of ten promissory notes for 1*l.* each against the defendant, as the maker. The notes were all in the following form, and signed by the defendant:—

"£1. Town and county of *Southampton.* £1.
N° a 7027. Bank N° a 7027.
I promise to pay the bearer on demand one pound, value received. *Southampton,* the 24th day of *March,* 1818.
For *W. Smith, W. P. Smith,* and *W. R. Taylor.*
"*Wm. Smith.*"

"One.
"Ent[d]. *J. H. Thring.*"

By *W. Smith* and also by *Wm. Smith* was meant *William Smith* the defendant; by *W. P. Smith* was meant *William Purdue Smith*; and by *W. R. Taylor* was meant *William Raynsford Taylor.* The defendant and *William Purdue Smith,* and *William Raynsford Taylor,* were, at the time of the making of the notes, bankers and co-partners. The defendant pleaded in abatement that the promises were made jointly with *William Purdue Smith* and *William Raynsford Taylor,* and not by himself alone; to which it was replied, that the promises were made by the defendant alone, and issue was joined thereon. At the trial before *Burrough,* J., at the last *Summer* Assizes, for the county of *Southampton,* a verdict was found for the plaintiff for 10*l.* damages, subject to the opinion of the Court as to the several liability of the defendant on the foregoing notes. If the Court shall be of opinion that the defendant was

severally liable on the said notes, then the verdict is to stand; if not, then the verdict to be entered for the defendant.

Selwyn for the plaintiff. If a contract be joint, and one of the contractors only be sued, he may plead in abatement that the contract was made by himself and others; but if it be joint and several, one may be sued alone. The notes in question are obviously joint and several, and therefore the defendant cannot plead in abatement. From the very terms of the note it is plain that each member of the banking firm is severally liable. This is manifest by the use of the pronoun *I*, at the commencement. Admitting that the defendant had signed the note for himself *and partners*, still that will not alter the several effect of the instrument as to himself; for though the defendant may be considered as binding his partners as well as himself, yet he makes himself, at all events, severally liable by the use of the personal pronoun at the beginning of the note. If the firm had intended to create only a joint liability, instead of using the article "*I*," they should have put in "*we*," and then the note would, upon the face of it, have been joint and not several; but having adopted a different form, they have made themselves severally as well as jointly liable, and this action is maintainable against the defendant alone. There are no express decisions to govern this question, but there are some authorities which bear upon it. In the case of *March* v. *Ward* (*a*) the instrument commenced, "I promise to pay," and it was signed by two individuals, and an action being brought against one of them, Lord *Kenyon* held, that the pronoun *I* applied to each severally. As far as that decision goes, it is an authority in favour of this case. So from the cases of *Clark* v. *Blackstock* (*b*), and *Lord Galway* v. *Matthew* (*c*), the same conclusion may be drawn. The latter case is indeed an express authority to shew, that the plaintiff

(*a*) Peake's N. P. C. 130. (*b*) Holt's N. P. C. 474. (*c*) 1 Campb. 403.

1823.



HALL v. SMITH.

might in this instance have sued the defendant and his partners jointly, or any one separately. In the case of *Sayer* v. *Clayton* (a), the plaintiff declared against the defendant as one of several obligors of a bond, and the form of the instrument being " obligo me," the Court decided that it was both joint and several. On the authority of these cases, and looking to the terms of the note, the plaintiff is entitled to judgment.

Bayly for the defendant. This is a case of the first impression, and in its result must affect not only all country bankers, but also operate upon the circulation of Bank of *England* notes. If the Court shall be of opinion that a person who signs " for *A.*, *B.*, and *C.*," is himself liable to be sued, the signing clerk of the Bank of *England* might be sued personally upon the notes of that institution. Construing this instrument, however, according to its fair import, it is joint and not several. If it be admitted that as far as the defendant's partners are concerned the note be joint, it follows as a consequence that it must be joint as to the defendant also, inasmuch it cannot have one effect as to a portion of the firm, and another as to the individual who happens to be the person signing for himself and partners. This defendant signs in the character of partner, for himself and the other members of the firm, and it is impossible to cast upon him a several liability. In the character of a partner he might by law bind his copartners jointly, but he had no authority to bind them separately, and therefore the argument on the other side is not maintainable. Indeed the cases relied upon are the very authorities upon which the defendant rests, to shew that this cannot be considered as a several contract. The case of *Lord Galway* v. *Matthew* is clearly with the defendant, because there it was decided that the note, which was signed in a manner exactly similar to that in the present case, was merely a joint contract.

(a) 1 Lutw. 696.

The Court must look to the intention of the parties, and if it appears from the note itself that the parties plainly intended to make a joint and not a several instrument, they will give effect to that intention. This is manifest from the terms of the note; and, considering the hardship of imposing the liability upon the defendant alone, the Court will decide that this action cannot be supported.

BAYLEY, J.—I am of opinion that this action is maintainable. In so deciding we are not giving to this instrument a different effect from that which it plainly imports upon the face of it. We are merely construing the words as they appear upon the note itself. The language of the instrument is, "I promise to pay the bearer on demand one pound, value received. For *W. Smith*, *W. P. Smith*, and *W. R. Taylor*." Signed "*Wm. Smith*." What does that import to be; and who is it that undertakes to pay? Clearly *William Smith*, who says, "I promise to pay." He is the only promising party. It is true he promises for himself and partners, but he alone promises. That is the legal and literal meaning of the words in question. Now it has been frequently decided, that if a party enters into a contract in his own name for the benefit of others, either he may be sued, because he entered into the contract, or those persons for whom he entered into it, may be sued; and, è converso, the agent may sue, or the parties for whose benefit the contract is effected may sue. It is urged that there may be some hardship in imposing individual liability upon this defendant. There is really none, which might not easily have been avoided by using the word "we" instead of the article *I*. Had that been done no difficulty would have arisen. The terms of this instrument might shew a different degree of obligation on the parties, at the time of the trial, according as the plaintiff might elect, against whom he would bring his action. For instance, if he sues *William Smith* alone, all he would have to do would be to

1823.

HALL v. SMITH.

prove *William Smith*'s hand-writing; but if he were obliged to sue all the firm, he would have to prove a partnership; and if he failed in doing that, he would be nonsuited. It therefore makes a great difference to the holder of a note of this description, whether he is at liberty to sue one maker only, or is bound to sue all. If he sues all, he takes upon himself the obligation of proving a partnership, which in many instances would be difficult to establish. The cases of *March* v. *Ward* and *Clark* v. *Blackstock* decide, that where the party uses the pronoun "I," a several obligation is thrown upon all the parties who sign the note. That is not exactly this case; but à fortiori, if the parties who sign are severally liable, this defendant, who is the person actually making the promise, is liable, and he is not at liberty afterwards to deny his promise. I think therefore that the plaintiff is entitled to judgment.

HOLROYD, J.—I am of the same opinion. It is unnecessary to decide whether the defendant's signature to the note for himself and partners would make the partners severally liable. Here the defendant promises for himself at least, and that is sufficient for the purpose of holding him severally liable in this action.

BEST, J., concurred, and said there was no analogy between this case and that of the signing clerk to the Bank of *England*. Here the defendant was a partner, and signed in that character; but the signing clerk of the Bank of *England* is not a partner in that institution, and signs only "for the Governor and Company," thereby expressly excluding his own personal liability.

Postea to the plaintiff.

Doe, d. Sir R. Sutton, Bart. *v.* P. F. Harvey, Esq. Executor of A. D. O'Kelly, Esq.

An act of parliament granted to tenant for life a power of making leases for any period not exceeding ninety-nine years. "So as every such lease be made *to take effect either in possession, or immediately after the determination of the leases then subsisting*, thereof, respectively; and so as in every such lease there be reserved to be payable, during the term thereby granted, *the best and most beneficial yearly rent* or rents, to be incident to the immediate reversion of the premises, *that can be reasonably had at the time of making such lease*, without taking any fine, foregift, &c." When this power was granted, the estate was let upon leases, which would expire on the 10th *October*, 1791. The tenant for life, in pursuance of one entire bargain, granted at one and the same time, two leases of the premises, one dated 29th *May*, 1787, for thirty years, to commence on the 10th *October*, 1791, and the other dated 4th *June*, for sixty-three years, to commence 10th *October*, 1721:—Held, that the last-mentioned lease was a fraud upon the power, not being made to take effect immediately after the expiration of the subsisting lease.

In the first of these two leases a yearly rent of 270*l.* was reserved, and, in the second, a rent of 120*l.*, the grantor stipulating in the latter that the tenant should rebuild the premises either before the expiration of the term first demised, or during the first year of the second demise:—Held, that supposing these rents to be the most beneficial which could be obtained, as between lessor and lessee, still they were not so as between tenant for life and the reversioner, and consequently the power was also, in this instance, violated.

Ejectment for five houses situate in *Half-moon Street, Piccadilly*, in the county of *Middlesex*. At the trial before *Abbott*, C. J., at the *Middlesex* Sittings after *Hilary* Term, 1822, a verdict was taken for the lessor of the plaintiff, subject to the opinion of the Court on the following case:

By an act of parliament of the 23 *Geo.* 3, entitled "An act for enabling *W. Pulteney*, Esq. to grant leases of certain estates in the county of *Middlesex* and city of *London*," the following leasing power was given:—"That it should and might be lawful to and for the said *W. P.* from time to time by indenture, duly executed, &c. to lease unto any person or persons whatsoever, all or any part of the said premises therein mentioned; to hold the said premises unto the persons unto whom, or for whose benefit such lease should be made, his executors, &c. for any term or number of years, so as such term or number of years did not exceed the term or space of ninety-nine years from the date of executing such lease; and so as every such lease or leases be made to take effect either in possession, or immediately after the determination of the leases then subsisting thereof respectively; and so as that in every such lease there be reserved to be

1823.

DOE
v.
O'KELLY.

payable, during the continuance of the estate and term to be thereby granted, the best and most beneficial yearly rent or rents, to be incident to the immediate reversion of the premises, that, considering the nature of the case, can be reasonably had and obtained for the same at the time of making such lease, without taking any fine, income, premium, or foregift, for or in respect of making such demises or leases." In virtue of this power the said *W. P.* by an indenture of lease, bearing date 29th *May*, 1787, demised the premises in question to the said *A. D. O'K.* his executors, &c., to hold from 10th *October*, 1791, for the term of thirty years, at the yearly rent of 202*l.* 10*s.* for the first year of the said term, and at the yearly rent of 270*l.* for the residue of the term, and which in the lease was stated to be the best and most beneficial rent that could be reasonably had or obtained for the said thereby demised premises. At the time of granting this lease there were existing leases of the same premises, bearing date 30th *November*, 1730, for several terms of years, which would expire on the said 10th *October*, 1791. By another indenture of lease, bearing date 4th *June*, 1787, and which was agreed for at the same time as the lease of 29th *May*, 1787, by the same bargain, and in pursuance of which both leases were executed at the same time, the said *W. P.* demised the same premises, to hold the same to the said *A. D. O'K.* his executors, &c. from 10th *October*, 1821, for the term of sixty-three years, at the yearly rent of 120*l.*, which, in the said lease, was stated to be the best and most beneficial yearly rent, incident to the immediate reversion of the premises, that, considering the nature of the case, could be reasonably had or obtained for the same. In the lease of 4th *June*, 1787, was the following recital:—"Whereas the messuages or tenements hereinafter demised, are held by virtue of or under six several leases, five whereof being dated 30th *November*, 1730, will expire on 10th *October*, 1791; and the other of the said leases, made to the said *A. D. O'K.*, bear-

ing date 29th *May*, 1787, for the remainder of a term of years, which will expire on 10th *October*, 1821. And whereas the said messuages or tenements have been surveyed by *J. R. Cockerell*, surveyor, who is of opinion that it will be for the benefit, as well of the persons entitled to the premises in reversion, as of the person in possession, that on or before the expiration of the said last recited lease, the said messuages or tenements should be rebuilt." This latter lease contained a covenant to rebuild the demised messuage and premises before the expiration of the term granted by the lease of 29th *May*, 1787, or within the first year of the term of sixty-three years, thereby granted. The premises have not been rebuilt. The ejectment was served on 26th *October*, 1821. *W. P.* the lessor in the said leases granted to the said *A. D. O'K.*, died in the year 1820, having been in the receipt of the rents and profits of the said premises, under the lease of 29th *May*, 1787, up to the period of his death. Sir *R. Sutton*, Bart., the lessor of the plaintiff, is now entitled to the premises in question, in case the Court should be of opinion that the defendant is not entitled to hold them. At the time of granting the lease of 29th *May*, 1787, if the premises had been let for an entire term of ninety-three years, from 10th *October*, 1791, the annual rent of 270*l.* would have been more than a fair annual rent for the first thirty years, and the rent of 120*l.* less than a fair annual rent, for the residue of a term of ninety-three years. At the time of granting the lease of 29th *May*, 1787, the premises were capable of standing thirty years; but it was the opinion of the surveyor, consulted at the time of completing the bargain and executing the said two leases, that it would be necessary and proper to pull down and rebuild them at such time as specified in the lease of 4th *June*, 1787; and the calculation of the rents in the two leases of 29th *May*, 1787, and 4th *June*, 1787, was made upon the supposition that the premises should be pulled down and re-built at such a time as specified in the

1823.

DOE
v.
O'KELLY.

lease of 4th *June*, 1787; and taking into consideration the covenant to re-build in that lease, the rents reserved under those two leases were, taking the whole as one bargain, the best and most beneficial yearly rents that, considering the nature of the case, could be reasonably had and obtained for the said premises at the time of making the leases of 29th *May*, 1787, and 4th *June*, 1787.

Denman, C. S., for the lessor of the plaintiff. First, the lease of 4th *June*, 1787, is not within the leasing power reserved by the act of parliament, and is consequently void. There was a lease which would expire on 10th *October*, 1791, subsisting, when the lease of 29th *May*, 1787, was executed. It is said by Lord *Holt*, with reference to leases in reversion, that "where mention is made of leases in reversion in a power, this shall be intended of leases to commence after a present interest in being;" and again, "when applied to a lease for years, it shall be intended of a lease which shall take effect after the expiration or determination of a lease in being." *Winter* v. *Loveday* (a). Now, in this case, the first lease was a lease in reversion, which was to take effect after the expiration of the subsisting lease, and was an execution of the power. The second lease was to take effect thirty years afterwards, and therefore is clearly not within the power. Then, second, the rent reserved was not the best and most beneficial that could be had or obtained, within the language of the power, because a much higher rent was to be paid for the first thirty years of the term, than for the remainder, which is a fatal objection, in another point of view, because it was in effect taking a premium or foregift for making the lease, and was as directly in violation of the conditions of the power, as it was likely to be in the end injurious to the interests of the reversioner. On these grounds the plaintiff is entitled to judgment.

(a) Com. Rep. 37.

1823.

DOE v. O'KELLY.

Littledale, contrà. The act of parliament empowers the tenant for life to grant leases either in possession or reversion, providing only that they shall not exceed the term of ninety-nine years, and therefore as the tenant for life was authorized to grant one lease, commencing in the year 1791, for the full term of ninety-nine years, it seems difficult to suggest upon what principle he was prohibited from granting two several leases, so that they did not together exceed that term; because the only possible object of the restriction was to prevent the estate from being charged with more than one term of that duration. Where a power authorises the appointment of a fee to be executed at several times, a life estate may be appointed at one time, and the fee at another. *Rovey* v. *Smith* (*a*), *Snape* v. *Turton* (*b*). So where, under a power in a will to lease for twenty-one years, the donee leased for that term, and then a year before the expiration of it, made a new lease for twenty-one years to another person, to begin in præsenti; it was argued, that although he could not make leases in reversion, yet such a lease as this he might make, for this was to begin presently, and the inheritance was not charged in the whole with more than twenty-one years. *Read* v. *Nash* (*c*). The principle there contended for, seems also to have been recognised by Lord *Ellenborough* in *Doe* v. *Prideaux* (*d*), where he expressly alludes to *Read* v. *Nash*, as having settled that point, which he adds, "is recognised as law in *Goodtitle* v. *Funucan*" (*e*). The result of these authorities is, that tenant for life may, by several instruments, made at different times, execute his power, if he does not go beyond the period limited in the power. It is to be observed in this case that in the second lease, made in 1787, the obligation of re-building is imposed on the tenant. Now, nothing could be more reasonable than that the expence to which the tenant was to be

(*a*) 1 Vern. 84.
(*b*) Cro. Car. 472.
(*c*) 1 Leon. 147.
(*d*) 10 East, 158
(*e*) Doug. 5.

1823.
DOE
v.
O'KELLY.

put in re-building, should have some effect upon the rent. According to the finding of the Jury, the Court are bound to presume that the rent reserved was the best and most approved which could be had. [*Bayley*, J. As between lessor and lessee, the finding of the Jury may be well justified, but is that so, as between the tenant for life, and the reversioner?] Then the case should be submitted to a second Jury, if the finding of the first has not satisfactorily ascertained this point. Admitting that two different rents could not be reserved by the same deed during the whole of one term, (and which cannot be denied), still in this case there are two terms, each deed reserving a rent applicable to the respective terms. As there is therefore nothing incongruous in such an execution of the power, the defendant is entitled to judgment.

Denman, in reply, was stopped by the Court.

BAYLEY, J.—I am of opinion, that the lessor of the plaintiff is entitled to judgment. The case admits of no doubt, and I think the first point is sufficient to dispose of it. The power to lease is a power by which one man is enabled to bind the property of another; and therefore we ought to take care that it is executed honestly, fairly, and consistently with the authority given. The party is not at liberty to do that indirectly which he cannot do directly. It is conceded by the defendant's counsel, that under one entire lease for a period of ninety-three years, two indifferent rents, one applicable to a portion, and the other to the remainder of the term, could not be reserved, and consequently that if the two rents in this case were reserved in the same lease, it would not be a valid execution of the power. Conceding that point, decides the question. If the two rents could not be reserved in one entire lease, it follows as a consequence, that the party is not at liberty to make two successive leases of this description. The ques-

1823.

DOE
v.
O'KELLY.

tion here is, not whether the tenant for life is entitled at different periods to make successive leases, but whether he has a right at one and the same period, and under one and the same bargain, to make two successive leases. I think he has not, and that the execution of the leases in this case, is a fraud upon the power. The power is to be executed by the party according to the circumstances and condition of the estate at the time it is executed, and one of the qualifications of the power is to enable the tenant for life "to lease for any term or number of years, so as such term or number of years do not exceed the term or space of ninety-nine years from the date or time of executing such lease, and so as all and every such lease or leases be made *to take effect*, either *in possession*, or *immediately after the determination of the leases then subsisting thereof respectively*." Now in the first place this is not a lease *in possession*, nor is it to take effect immediately after the determination of the lease *then subsisting*. I do not look to the machinery, but to the real facts and substance of the transaction. In substance the two leases are but one, and are in pursuance of one entire bargain, though reserving two different rents. The entire bargain is made in 1787, and when the two leases in question were executed, there was a subsisting lease, which was to expire on the 10th of *October*, 1791; so that the lease which was to commence in *June* 1821, was not, in the language of the power, "a lease to take effect in possession, or immediately after the determining of the lease then subsisting." I am therefore of opinion, that this is not a lease made in pursuance of the power. There is one view in the consideration of this case, which would make a great difference to the reversioner, if the tenant for life, instead of being confined to the power of making one entire lease, might make several successive leases. The argument is, that the tenant for life is entitled at one and the same time to make two successive leases. If so, why may he not make twenty, fifty, or even ninety-nine leases?

1823.
Doe
v.
O'Kelly.

Every lease is to contain a power of re-entry for non-payment of rent. Such a power, if the lease be entire, will affect the whole term demised, and in case of non-payment of rent, or other breach of covenant, the reversioner would be entitled to re-enter, at once, for the whole remaining term, and would be placed in the same situation as if no lease had been granted. But if instead of one, there are two or twenty leases, he would be only entitled to take possession for the term for which the particular lease is granted. The consequence of that would be to make the clause of re-entry absolutely nugatory, for, supposing the tenant to be turned out for a forfeiture of any one lease, he might re-enter under the next lease in succession, and so defeat the right of the reversioner. No such consequence would follow, if but one lease had been granted. I will put this case:—In one of the leases a rent of 270*l.* for thirty years is reserved; suppose the tenant for life dies at the end of twenty-seven years, and the reversioner comes into possession, and then the lessee informs him that he is unable to pay the remaining three years rent, or assigns the lease to a pauper, and the reversioner thinks proper to enter for a forfeiture, what is to prevent the lessee from re-entering at the end of the three years, and enjoying the property at the reduced rent of 130*l.* per annum until the end of the term demised by the second lease? I apprehend nothing would prevent him if this power has been properly executed, but it would be monstrous to hold such a doctrine. I believe this is the first instance in which an attempt has been made to execute successive leases under a power of this description; and for the reasons I have given, it seems to me that the execution of successive leases under one entire bargain, reserving different rents, is a fraud upon this power. It is not necessary to intimate any opinion whether, if the tenant had honestly and *bonâ fide* made a lease for a certain term, he might be entitled to make another lease for another term, because the whole transaction is to be con-

1823.



Doe
v.
O'Kelly.

sidered as an entire bargain, and I am of opinion that there ought to have been one entire lease. The remaining question is, whether there has been a compliance with the stipulation, that there should be the best and most beneficial rent reserved. There are certainly in this case two propositions stated, which it is difficult to reconcile. It is found in the case, that if the premises had been let in 1787 for the entire period, the rent of 270*l.* per annum for thirty years would be more than the fair annual rent, and that 120*l.* would be less than the annual value for the remainder of the term, of sixty-three years, unless the tenant was bound to re-build. Now the clause in the power upon which the question arises, says nothing as to a covenant for re-building. If the premises had been let for an entire term, the rent at the commencement would be too high, and the rent at the conclusion would be too low. Upon that state of the case, it is clear that the lease would be void. The lessor is not to take a foregift, nor any thing by way of premium, but is to let in proportion to the whole value of the premises during the whole term. If they are let too high at the early part of the term, it follows that the reversioner will have too little to receive when he comes into possession. This consequence would not follow if the whole were let at an entire rent. The case, it is true, finds that these rents were the most beneficial that could be procured. As between the lessor and the lessee, that may be true, but are they so with reference to the interests of the remainder-man? I am of opinion, for the reasons I have stated, that they are not. It is suggested, that if there is any doubt upon this subject, the case ought to be sent to another Jury for reconsideration. But I have so decided an opinion upon the first point, that I think it would be doing injustice to the plaintiff to send the case to another Jury. Upon the first question I am clearly of opinion, that the second of these two leases is a fraud upon the power, and consequently the lessor of the plaintiff is entitled to judgment.

1828.

DOE v. O'KELLY.

HOLROYD, J.—I am of the same opinion, and I think that on both points the plaintiff is entitled to recover. First, these two leases being founded on one entire bargain, and reserving two different rents, are clearly a fraud upon the power, and though the whole term, comprehended in both, does not exceed ninety-nine years, still that does not remove the objection. But independently of this, the second lease is not to take effect, according to the words of the power, "in possession or reversion immediately after the term granted by the then subsisting lease;" for at that time the previous lease would not expire until the 10th *October*, 1791. Supposing, however, that these leases could be considered only as one, inasmuch as the term in both does not exceed ninety-nine years, still as different rents are reserved, there would be a violation of the power. The bargain being entire, the rent, whatever it is, must also be entire, and extending throughout the whole term. This is not so, and therefore on that ground the plaintiff is entitled to recover. Then, secondly, I think the rent reserved is not the best and most improved, according to the requisites of the power. We are to look to the interests of the reversioner. It may be true, as between lessor and lessee, that the rents reserved are equitable and just, but by this contrivance the reversioner is placed in a worse situation than he would have been, had the power been properly executed. A larger rent is reserved in the beginning of the term than the premises are fairly worth, whereby the tenant for life derives an advantage to which he is not entitled, and during the remainder of the term the rent is less than the premises are worth, whereby the reversioner is deprived of that benefit which it was the object of the power he should have. On both grounds I think the plaintiff is entitled to judgment.

BEST, J.—I am of the same opinion. It is no answer to the first objection, that the power has been substantially

1823.

DOE
v.
O'KELLY.

complied, inasmuch as the term of ninety-nine years has not been exceeded in both leases, so as to injure the inheritance. It is one of the express conditions of the power, that no lease is to be granted, to take effect, until the expiration of the subsisting lease. Has that condition been complied with? The lease in question was not to take effect until thirty years after the subsisting lease. The subsisting lease did not expire until 10th *October*, 1791, and consequently the second lease could not be valid unless it was to take effect at that period. That is a decisive objection. But supposing it were not so, still the second point presents an insuperable difficulty. Was the best and most approved rent reserved during the term, so as to satisfy the condition of the power? I am clearly of opinion that it was not, and that the machinery which has been adopted would produce the greatest injustice to the reversioner. A rent of 270*l*. is reserved during the first portion of the term, and 130*l*. during the remainder. It is conceded, that 270*l*. would be too much for the term demised in the first lease, and 130*l*. too little in the second; but it is said, that this is counter-balanced by the stipulation that the tenant shall rebuild the premises. In this point of view, the bargain may be very fair towards the tenant, but is it so towards the reversioner? Clearly not, because the operation of this proceeding is to throw the burthen of re-building entirely upon the reversioner, the value of whose estate is diminished by the expense of re-building, which has been abated from the tenant's rent during the remainder of the term, and put into the pocket of the tenant for life. It is quite obvious that the object of this contrivance was to cast the burthen of re-building upon the reversioner; and I think we ought not to give effect to such an arrangement. I am decidedly of opinion that upon either of the grounds mentioned, the lessor of the plaintiff is entitled to judgment.

Judgment for the plaintiff.

1823.

JONES v. OWEN, Esq.

The statute 13 G. 3. c. 78, s. 60, imposing a penalty on the driver of a cart, &c. for riding thereon under the circumstances therein mentioned, authorises a justice on his own view, or upon the oath of one witness, to convict the offender, and in case the offender refuses to discover his name, or the name of the owner of the cart, &c. he is subjected to a like penalty, and may, without warrant, be apprehended forthwith by the person seeing the offence committed. Where the driver of a waggon committed an offence within this act, in the view of a justice, and having placed himself before the board on which his master's name was painted, so as to prevent the discovery of the owner, and the justice, in order to ascertain the name, stopped the horses and laid hands on the driver, and removed him from his position before the board, and thereby informed himself of the ownership:—**Held, on demurrer, that this was a trespass, and gave the driver a right of action.**

TRESPASS for an assault and false imprisonment. The declaration was in the common form, but adding that the defendant struck two horses of the plaintiff, which were drawing a waggon of the plaintiff on the king's highway, "and stopped the said horses and the said waggon, and hindered the same from travelling in and along the said highway, by means whereof the plaintiff was hindered from performing his necessary affairs," &c. The defendant pleaded, first, the general issue; second, son assault demesne; and, third, as to stopping the horses and cart, &c. "that on, &c. at, &c. defendant was riding on horseback in and along the said highway, and that the said cart or waggon, drawn by the said horses, was then and there passing along the said highway, and that plaintiff was then and there unlawfully riding upon the said cart or waggon, and there not being then any person on foot or on horseback to guide the said cart or waggon, or horses drawing the same, and that defendant thereupon requested plaintiff to come down from the said cart or waggon, which he wholly refused to do, and on the contrary thereof, placed himself upon the shafts of the said cart or waggon, behind the horse attached to the said cart or waggon, and immediately before the board on which the name of the owner of the said cart or waggon was painted, in order to conceal the name of the owner from defendant; and that defendant thereupon requested plaintiff to acquaint him with the name of the owner, which he wholly refused to do, and thereupon defendant requested plaintiff to move on one side of the said cart or waggon, in order that defendant might read the name of the owner, which was painted on the board in front

thereof, with which said last-mentioned request he wholly refused to comply, whereupon defendant, in order to read the name of the owner of the said cart or waggon, so painted as aforesaid, and because he could not otherwise read the same, stopped the said cart or waggon, and the said horses so drawing the same, and hindered the same from travelling, &c. as he lawfully might for the causes aforesaid; and in order to read the name of the owner of the said cart or waggon so painted as aforesaid, and because he could not otherwise read the same, defendant gently laid his hands upon plaintiff, in order to remove him on one side of the said cart or waggon, and did remove him on one side thereof, as he lawfully might for the cause aforesaid," &c. Upon the first plea, issue joined; to the second, a replication de injuriâ suâ; and to the third, a general demurrer. Joinder in demurrer.

Campbell, in support of the demurrer, was stopt by the Court, who desired to hear

Patteson, contrà. This plea is a sufficient answer to the declaration, under the 60th sect. of the 13 *Geo.* 3. c. 78. In that clause it is first enacted, that any driver of a waggon, &c. riding thereon, not having a person on foot or on horseback to guide it, or refusing to discover the name of the owner, shall, upon conviction on the view of a justice, or on the oath of one witness, be liable to a penalty of 10*s.*; and second, that any such driver may be apprehended by any person seeing either of those offences committed. This clause therefore provides two separate modes of proceeding against an offender; the one by conviction upon view of a justice, and the other by laying an information against him before a magistrate. It is clearly left to the complaining party to adopt whichever of these modes he may, under the circumstances of the case, think most proper; for the statute does not compel the apprehension of the offender.

1823.

JONES v. OWEN.

Now in either mode of proceeding, the defendant was perfectly justifiable in the measures he took. If as a magistrate, he intended to convict on his own view, it was absolutely necessary that he should obtain a sight of the board on the cart, in order to ascertain whom to convict; he could not know the name or person of the driver, and the only means of learning *his* name, was by discovering the name of his employer; and therefore in this view of the case, he was justified in removing the plaintiff from before the board. Again, if he intended to lay an information before a magistrate, either for the riding upon the waggon, or for the refusal to discover the owner, the same measure was equally necessary; for without the knowledge which that act gave him, he could not know against whom to inform. He was not bound to apprehend the plaintiff. The power to apprehend is evidently additional and cumulative. He might not be physically capable of apprehending him, or he might not chuse to risk a struggle in the attempt. Surely then, he was justified, for the ends of justice, in taking any step which would enable him to convict the party in the more convenient way. In either view of the case, therefore, the defendant was justified in laying hands on the plaintiff, and as this plea is framed precisely upon the words of the act of parliament, and is large enough to comprehend both cases, it is clearly a good plea, and the defendant is entitled to judgment on demurrer.

Per Curiam.—It is true that the statute provides two methods of proceeding against an offender, the one by conviction on view by a justice of the peace, and the other by information, upon the oath of one witness before a justice of the peace, and it adds the power of immediate apprehension by any person for the purpose of enforcing the penalty. But the defendant in this case has unfortunately adopted a third course, for which the statute does not provide, and which this plea cannot justify, namely, that of stopping



the horses, and of forcibly removing the driver from one part of the waggon to another. Statutes of this description, which provide an instant and summary remedy for offences so dangerous to the public, are highly beneficial; but they are extremely liable to abuse, and we must take care that in enforcing them parties adhere to the strict letter of the law. In this case two offences were completed, the riding upon the waggon, and the refusing to communicate the owner's name; for either of those the defendant might have convicted the plaintiff on his own view as a magistrate, or have apprehended him as a private individual for the purpose of his being dealt with according to law. He does neither, but lays hands on the plaintiff, and removes him from the cart. This he was not authorized by law to do; the act was an assault in law, and cannot be justified by the plea which he has put on the record. The plaintiff therefore is entitled to our judgment.

Judgment for the plaintiff.

In the Matter of SAMUEL LOCKE, a Bankrupt.

An instrument reciting that it had been agreed to sell an annuity, secured upon property in possession of the grantor, but containing no words of present grant, cannot be sued upon in a court of law, even though it should be inrolled.

CASE sent by his Honor, the Vice-Chancellor, for the opinion of this Court.

On the 2d *June*, 1813, the following agreement was made between the bankrupt, by the description of "The Reverend *Samuel Locke*, of *Farnham*, in the county of *Surrey*, D. D." of the one part, and *William Hayes*, of the *Middle Temple*, *London*, student at law, on behalf of *William Langslow*, of the city of *Bath*, Esq., of the other part:

Whereas the said *S. L.* has agreed to sell to the said *W. L.* one annuity or yearly sum of 67*l.* 12*s.* to be payable

1823.

In Re Locke.

during the lives of the said *W. L.* of his nephew *R. L.* a captain in the *Wiltshire* regiment of militia, and of the said *W. H.*, and the life of the longest liver of them, at the price of 600*l.*: And whereas the said *S. L.* is now possessed of a certain copyhold messuage, cottage, or tenement, with the garden, barn, and appurtenances, and a copyhold close or piece of land adjoining thereto, containing six acres or thereabouts, and which premises are let to *J. W.* at the yearly rent of 16*l.* 16*s.* and the same are situate within, and held of the manor of *P.* in the parish of *T.*, in the said county of *Surrey*. And he is also possessed of a mortgage security for the sum of 250*l.* and interest, upon another copyhold messuage, cottage, or tenement, with the garden and appurtenances, and a close or piece of land thereto adjoining, containing in the whole two acres, or thereabouts, and held of the said manor of *P.* and upon a freehold close, piece, or parcel of land, containing three acres, or thereabouts, situate in the parish of *T.* aforesaid. And he also holds a policy of insurance, No. 19,647, bearing date 23d *December*, 1801, obtained from the Equitable Assurance Office in *London*, whereby the sum of 700*l.* is assured, payable after the death of the said *S. L.* under the annual premium of 20*l.* 9*s.*: And whereas the said *S. L.* has proposed to secure the said annuity of 66*l.* 12*s.* upon the said copyhold premises, of which he is so possessed as aforesaid, and upon the said mortgage security and policy of insurance. Now these presents witness, that in consideration of the sum of 600*l.* of lawful *British* money, this day paid by the said *W. H.* as agent for and on behalf of the said *W. L.* to the said *S. L.* in notes, of the Governor and Company of the Bank of *England*, payable on demand, the receipt of which sum the said *S. L.* hereby acknowledges; the said *S. L.* hereby agrees that he will forthwith, when thereunto required by the said *W. L.* his executors, administrators, and assigns, but at his own expence, make and execute such acts and deeds as the counsel learned in the law of the said *W. L.* his executors,

&c. shall reasonably advise for surrendering the said copyhold premises, and for assigning and transferring the said mortgage security and policy of insurance, and all monies due, or to become payable thereon respectively, unto the said *W. L.* his executors, &c. or unto such person as he or they shall direct, according to the nature and quality of the premises respectively, upon proper trusts, and with proper provisions, covenants, and agreements for securing to the said *W. L.* his executors, &c. the payment of an annuity or yearly sum of 66*l.* 12*s.* during the lives of the said *W. L.*, *R. L.*, and *W. H.*, and the life of the survivor of them, to be payable half-yearly, on the 2d *June* and 2d *December* in every year, clear of all deductions (except the property tax), the first half-yearly payment to be made on the 2d *December* then next ensuing. And the said *S. L.* also agrees, that he will, at his own costs and charges, keep the said policy of insurance on foot during his life, and that a proper covenant for that purpose shall be inserted in the deed or instrument whereby the said annuity shall be secured. But it is agreed, that the said *S. L.* shall be at liberty to re-purchase the said annuity at any time by giving seven days notice, and on the expiration of such notice, transferring into the name or names of the said *W. L.* his executors, &c. the sum of 982*l.* 12*s.* 3*d.* 3*l.* per cent. consolidated bank annuities, and paying up the arrears of the said annuity, together with a proportional part thereof. And lastly, it is agreed, that the expence of the necessary deeds or instruments for securing the said annuity and of enrolling a memorial thereof, shall be borne and paid by the said *S. L.* In witness whereof, &c.

This instrument was never enrolled. A commission of bankrupt, dated 13th *September*, 1819, issued against *Samuel Locke*, under which he was duly declared a bankrupt.

The question for the opinion of the Court is, whether the above instrument was a grant of an annuity upon which an action at law could have been maintained for the re-

1823.
In Re Locke.

covery of the arrears of the annuity, if the instrument had been enrolled; or, whether it was merely an agreement to grant an annuity, upon which no such action could have been maintained, if it had been enrolled.

F. Pollock, for the petitioner, contended, that the instrument was in effect a grant of an annuity, such as would support an action at law for the recovery of arrears due upon the annuity. It must indeed be admitted that an annuity could be granted by deed only, and that the instrument before the Court was not altogether perfect as a present deed; but as it contained upon the face of it satisfactory evidence of an intention existing between the parties that the annuity should in fact be granted, there was enough to make a legal claim on the one side, and a legal liability on the other, and consequently enough to support an action at law for the arrears of the annuity. It is said in *Viner's Abridgment* (a), "Of such a rent as may be granted without deed, a writ of annuity does not lie, though it be granted by deed." Certainly no express authority could be found which held, that an annuity not granted by deed would be valid in a court of law; but he submitted that the agreement might be treated as evidence that an annuity had been granted, and he relied upon the language of the recital.

Abraham, contrà, contended, that as there were not words of grant in the instrument, it was quite clear that no action at law could be maintained upon it, and, after citing *Neild* v. *Smith* (b), he was stopt by the Court.

The Court intimated that there was no doubt whatever in the case. A grant of annuity must be by deed, and no action at law can be maintained upon any other instrument for the arrears of an annuity. It is quite clear that the in-

(a) Tit. *Annuity*, 503. C. 9. citing Co. Litt. 145. (b) 14 Ves. 491.

strument now before the Court is not a deed; for the recital evidently refers to some other and prior agreement, and the instrument itself approves itself by its language, a mere agreement. In order to constitute an annuity deed there must be positive words of grant immediately and presently; the word "grant" must be used; that was decided in the case of *Nield* v. *Smith*, and is now settled law. No such word is used in this instrument; it is altogether prospective; and therefore no action at law can be maintained upon it for the arrears.

The following certificate was afterwards sent to the Vice-Chancellor:—

"This case has been argued before us, and we are of opinion that no action at law could have been maintained to recover the arrears of the annuity, in case the said instrument had been enrolled.

"J. Bayley,
"G. S. Holroyd,
"W. D. Best."

Newling *v.* Pearce.

By an inclosure act, the tithes payable in respect of certain old inclosures were extinguished, and in lieu thereof a *corn rent* substituted, which was directed to be paid for ever afterwards to the impropriator and vicar, by the person who for the time being should be in the possession *or* occupation of the land out of which the rent should be issuing; and a power of distress was given for the recovery thereof, the same as is for rent service or other rent in arrear. For several years, part of such land remained untenanted and wholly unprofitable to the owner, who during that time resided elsewhere. The land was then demised to a tenant who entered and brought it into cultivation:—Held, 1. That during the time the land was untenanted and uncultivated the landlord was in the legal possession thereof, within the meaning of the act, so as to subject him to the payment of the corn rent in arrear; and, 2. That the goods of the tenant, coming in under him, were liable to distress for such rent in arrear.

Replevin for goods and chattels of the plaintiff, distrained by the defendant on 9th *October*, 1821, for corn rents claimed to be due from *Lady Day* 1815 to *Lady Day*

1823.
NEWLING v. PEARCE.

1819, under the *Barrington* Inclosure Act, 36 *Geo.* 3. At the trial before *Richards*, C. B., at the *Cambridgeshire Lent* Assizes, 1822, the Jury were discharged by consent from giving any verdict on the issue joined on the first plea, and on the second, in which the defendant alleged, "that neither the said plaintiff, nor *Richard Bendyshe*, were, nor was either of them, in the possession and occupation of the said allotments, at any or either of the times at which the said corn rents, or any or either of them became due and payable, in manner and form as the said defendant hath in his said cognizance and avowry respectively alleged," a verdict was taken for the plaintiff, with one shilling damages, subject to the opinion of the Court on the following case:—

This distress having been taken for corn rents, the payment of which was refused, solely on the ground, that during the period when the rents became respectively due, the land was not liable to the payment of corn rent, because no crop was raised upon it, and the owner had not the beneficial enjoyment of it; it was admitted that at the commencement of that period *Richard Bendyshe*, Esq., was seised in his demesne as of fee of the land for which the corn rents were claimed. During the period for which the corn rents were claimed, Mr. *Bendyshe* resided at a distance, and the land lay uncultivated; no crop of corn or annual produce was raised. At the termination of that period Mr. *Bendyshe* demised the land for a term of years to the plaintiff, who thereupon entered. The defendant proved by the collector of the land tax in *Barrington*, that he received the land tax due at *Michaelmas*, 1818, for all Mr. *Bendyshe's* land in the parish, including the land in question from Mr. *Swann Hurrell*, the brother of Mr. *William Hurrell*, the agent of Mr. *Bendyshe*; and Mr. *W. Hurrell* stated, that he had been allowed that money by Mr. *Bendyshe* in the settlement of their accounts. The plaintiff then called a witness, who stated, that during the period for which the

corn rent was claimed, the land lay barren, waste, and unoccupied. Sheep were turned on it by any one who pleased, to the amount occasionally of several hundred. Mr. *Bendyshe* did no repairs upon the land, nor had he any beneficial enjoyment of it up to *Lady Day* 1819. The land had been in the occupation of a person of the name of *Southeby*, as tenant to Mr. *Bendyshe* during all that time.

The act of parliament referred to in the pleadings was entitled " An act for dividing and allotting the common and open fields, meadows, commonable lands, and waste grounds within the parish of *Barrington*, in the county of *Cambridge*;" and enacted, that the commissioners therein mentioned should value all the common and open fields, meadows, commonable lands, and waste grounds by that act intended to be divided and allotted, and also the inclosed lands within the said parish, which, at the time of passing the act, were liable to the payment of tithes as therein mentioned, at the rate of four shillings for every statuable acre; and from the *London* Gazette, and by such other ways and means as they should think proper, inquire and ascertain what had been the average price of good marketable wheat in the markets of *Cambridge* and *Royston* during the term of twenty-one years next preceding *Michaelmas* 1794; and should, by their award thereinafter directed to be made, ascertain and set forth distinctly what quantity of wheat should in their judgment, according to such average price, be equal in value to a sum set on all the said common and open fields, meadows, and commonable lands, and waste grounds, and also all the inclosed lands in the said parish liable to the payment of tithes, at the rate of four shillings for every statutable acre; and from and after the expiration, or other sooner determination of the subsisting lease of the great or rectorial tithes, or in such other time as thereinafter provided, there should be issuing and payable, from time to time, for ever, to the master, fellows, and scholars of *Trinity* College, *Cambridge*, as impropriators of the said

1823.
NEWLING
v.
PEARCE.

rectory, and to *F. Finch*, vicar of the said vicarage of *Barrington* aforesaid, and their successors respectively, according to their rights and interests therein, out of the lands and estates of the several land owners and proprietors of estates in the said parish, (except as therein excepted) such yearly corn rents, or sums as should be in equal value to the quantity of wheat so to be ascertained by the said commissioners; and the said yearly corn rents, or sums of money should be payable and paid by the person or persons who for the time being should be in the possession or occupation of the respective lands and estates out of which the same should be issuing, to the said impropriators and vicar, and their successors, for ever, at the place and on the days therein specified; and which said several and respective corn rents should, from and after the commencement thereof, be in lieu of and full compensation and satisfaction for, all great and small tithes arising within the said parish of *Barrington*, and which of right belonged to the said impropriators and vicar. By a subsequent clause it was enacted, "that the said impropriators, and their successors, should and might (demand being previously made), have and exercise such and the same powers and remedies for recovering the said yearly rent of four shillings per acre, subject to such variation as before mentioned, when the same, or any part thereof, should be in arrear, as are by law given and provided for the recovery of rent service, or other rent in arrear."

Rolfe for the plaintiff. The question in this case is, whether the corn rent given by this act in lieu of tithes can be claimed for a period during which the land in respect of which it is claimed has lain uncultivated and unprofitable, and in circumstances under which the tithes themselves would not have been payable. The act provides that the great and small tithes shall be extinguished, and that in lieu thereof the impropriators shall receive a corn rent; and then enacts,

"that the said yearly corn rents shall be payable and paid by the person or persons, who, for the time being, shall be in the possession or occupation of the respective lands and estates out of which the same shall be issuing." This clause is not to be construed as imposing upon the owner of the soil a liability which must render his estate damnosa hereditas; the legislature could not intend to impose an additional burthen upon a land-owner, merely because he already had the misfortune to possess the fee-simple of an useless and unprofitable tract of land; and yet this consequence must ensue if the present claim is to be supported. What would have been payable upon this land if the inclosure act had never passed? Clearly nothing, for where there is no produce there is no tithe, and as the act does not create a new payment, but only substitutes a corn rent in lieu of the tithe, it seems to follow, that the corn rent is only payable where the tithe would have been payable, and consequently does not arise where there is no produce from the land. In the present case no tithe could have been payable, the corn rent therefore is in fact a compensation for, or in lieu of, a nullity, and the tithe for which it was intended as a substitute having ceased, the corn rent must of necessity cease also. Again, the person made liable by this clause, is "the person in possession or occupation for the time being," which the present plaintiff cannot be held to be. During the period for which the corn rent is claimed, no person was in *occupation* of the land, nor, properly speaking, was there any person in *possession* of it. The words are evidently used indifferently and synonimously. Possession, as here used, does not mean legal seisin, for else, even when the land is occupied by a tenant, it would be still possessed by the owner, and so the owner would be rendered liable to this payment, even though he had transferred the beneficial occupation and enjoyment to another. But at any rate the plaintiff was not in possession of the land during this period. Then was he in occupation of it? To hold that he was,

would be productive of great hardship and injustice. Here is land lying for many years, untenanted, uncultivated, and unproductive. At length a tenant comes into the occupation, and at a heavy expence and great labour brings it into a productive condition, and then this claim is set up, and he is required to pay the arrears of corn rent for all the years during which it was left barren and deserted, and when he was in all respects a stranger to it! Suppose he should be compelled to pay these arrears, from whom is he to recover them back? Not from his landlord; he can have no claim upon him previous to the commencement of his tenancy. Not from the preceding occupier; there is no such person in existence. He is utterly without remedy, and surely such a view of the case plainly shews the injustice of the claim. No argument in favor of the defendant can be derived from the modes prescribed for recovering the rent, which are declared to be " the same as are by law given or provided for the recovery of rent service or other rent in arrear;" because so far as respects the present occupier, there is no rent in arrear, the arrears being in respect of a period elapsed before his occupation began. But without relying upon this circumstance, the mere fact that the land was non-productive is an answer to the present claim. Suppose the case of a quantity of marsh or fen land overflowed and remaining covered with water during a space of two or three years, and consequently unproductive, could it be contended that such land could be liable for tithes, or for this corn rent which is substituted for them? Certainly not, and yet that case is not a stronger one than the present. Then the analogy between a modus and the present case is very strong, and strikingly illustrates the argument now contended for. There seems to be no real distinction, in point of effect, between a modus and a letting of the land. The object of a modus is the same as that of the present statute; the language, too, of both is substantially the same, and surely the argument as to the meaning of the

word "possession," is the same in reference to both. It must, indeed, be admitted, that the remedy provided is different, but the remedy in either case can be only co-extensive with the right. The real object in both cases is to substitute a payment in money for the taking of the tithes in kind, and to throw the burthen of that payment upon the actual and beneficial *occupier* of the land. Now it has been decided in several cases, that a modus throwing the payment on the land-owner, without reference to occupation, is not good. *Brown* v. *Dunnery* (*a*), *Driffield* v. *Orrell* (*b*), and *Ord* v. *Clark* (*c*). It is indeed competent to the legislature in any particular case to impose the payment upon the owner, as such, but then it must be done in express and unequivocal terms; and where that is not the case, the Court will lean strongly against such a construction as is calculated to break in upon a general and established principle. The application of such a construction in the present case would be productive of consequences extremely injurious, because it would lead to a general reluctance on the part of cultivators, to take land at all, and at least would deter them from making any attempts to bring waste land into a state of cultivation, when they found that the immediate result of their labours was the imposition of a heavy and ruinous payment on account of by-gone years. It would also tend to defeat the very object of the legislature. The policy of this statute is to encourage the farmer to bring barren land into a state of cultivation on profitable terms. The result is decidedly the contrary, and instead of relief, an accumulated burthen is laid upon those lands which are the least qualified to remunerate the expences of the cultivator. Then the only remaining argument is, that this corn rent is by the statute made payable out of the land, and recoverable by distress,

(*a*) Hob. 208.
(*b*) 6 Price, 319.
(*c*) 4 Gwill. 1437. 3 Anstr. 638. and 4 Wood. 480.

and therefore that it is in legal construction a rent, and as such is payable by the land, without reference to the interest of the party in possession or occupation. But this argument is not conclusive. The latter words of that clause have a qualifying operation upon the former, and the clause taken as a whole, clearly shews the intention of the legislature to have been, that the actual occupier for the time being shall be the hand to pay. Construing the act, therefore, according to its plain and ordinary meaning, having respect to the general principles of law on this subject, and considering the extreme hardship which must result to the present tenant if he is to be liable to the claim now made upon him, the Court will think that he is not included within the operation of the statute, and will hold this action maintainable.

Robinson, for the defendant, was stopt by the Court.

Bayley, J.—I am decidedly of opinion that the distress in this case was perfectly legal, and that the plaintiff is not entitled to any remedy by the present action. I think the clause in the inclosure act, by which the corn rent is substituted in lieu of tithes, is to be construed as a bargain between the owner of tithes, on the one hand, and the land-owners on the other. In this case the plaintiff is the representative and tenant of Mr. *Bendyshe*, who, as the owner of the fee, is in the eye of the law the occupier of the land, for the law places both the possession and the occupation in him. Possession, however, is in my opinion sufficient to bring the case within the act of parliament. Before this act was passed, the land in question was liable to the payment of tithes. One of the provisions of the act is, that the impropriator of the tithes shall henceforward receive from the land-owner a certain corn rent in lieu of tithes. It defines very particularly what that substitution shall be; it calls it "a yearly corn rent," and it

speaks of it as "issuing out of the land;" these are strong and expressive terms, and I am of opinion, that they justify us in considering this payment as a rent in the legal sense of the word. It then goes on to enact the mode in which the payment is to be made, and the hand from which it is to come, and from this part of the statute, a difficulty has been suggested, which, however, appears to me to be very easily surmounted. It is provided, that the person "in the possession *or* occupation" of the land shall be the hand to pay. The sentence is in the disjunctive; either is a qualification; then is there either in this case? Certainly there is possession if there be not occupation, because the owner of the fee had never given up his legal estate, although he had suffered the land to lie for a period uncultivated. This part of the statute, therefore, having provided for the payment, and having made it a charge upon the land itself, and upon the owner as possessor of the legal estate, a subsequent part goes on to prescribe the mode of recovery where the payment is not duly made. This is done by giving a power of distress "such as is given by law for the recovery of rent service or other rent," and it emphatically describes the payment in question as "the said yearly rent." Here again we are supplied with ample grounds for calling this a rent, and the conclusion is, that the land itself is made liable, and is to be resorted to for the payment of arrears of that rent, precisely as it would by law be for any other species of rent. I am not prepared to deny that this view of the statute may be productive of some hardship in this particular case; but we are to administer the law upon general principles; we cannot bend it to particular purposes, or vary it in order to alleviate individual hardships. The corn rent here is by the statute substituted for tithes, not merely de anno in annum, but for ever, and therefore I think it stands upon the same footing as any other rent, which the party is liable to pay, whether he occupies the land and makes it productive

or not. For these reasons I think this distress was legal, and judgment must be given for the defendant.

HOLROYD, J.—It certainly appears that the land in respect of which this corn rent is claimed, was, during the period for which that claim is made, in one sense of the word unoccupied; that is, it was not occupied by any tenant for the purposes of cultivation and profit. But in point of law, the owner was nevertheless in possession during all that time, and consequently he was in the eye of the law, and with reference to the provisions of this act, the occupier also. Then taking the facts of this case, and the provisions of the statute together, it is found, that certain arrears of a corn rent are due, and that they are due from a particular person, namely, the owner of the fee, whose representative and tenant the present plaintiff is. Under this statute the impropriator, or his lessee, has a right to the payment of the corn rent, and I do not see how the non-cultivation or desertion of the land can in any way diminish or retard that right. The case expressly finds, that during the whole of that period for which the corn rent is claimed, the lands in question were in the occupation of Mr. *Bendyshe* by a tenant, and consequently, although that tenant deserted the land, the occupation did not cease; in point of law the occupation can never cease; but when the actual occupation is given up by the tenant, the legal occupation reverts to the landlord, and he becomes, for the purposes of this statute, as well as upon general legal principles, the occupier, not only from that moment prospectively, but in relation back for the whole period of the demise. Upon this principle the present plaintiff, as the tenant and representative of the landlord, becomes clearly liable retrospectively, if this charge can be considered as a rent, and I am clearly of opinion that it must be so considered. The statute calls it in express terms "a yearly rent," and it also impliedly treats it as such, by providing

for the recovery thereof, the same remedies as are given for "any other rent;" and it seems to me equally plain from its very nature, that it is, and was meant to be constituted, a rent, for it is expressly made a charge upon the land, which is the very essence of every rent. I am therefore of opinion that the land was liable for these arrears, and that the present action cannot be maintained.

BEST, J.—I agree in the reasons given by my learned Brothers for thinking this action is not maintainable. This is to be considered as a composition for tithes under the authority of an act of parliament, and is not a person who compounds, obliged to pay his composition at all events?

Judgment for the defendant.

RAMSDEN and Another *v.* GIBBS.

Horses hired merely for the pleasure and recreation of the rider, are not liable to the duties imposed by the 44 *Geo.* 3 c. 98. and 1 *Geo.* 4. c. 88.

DEBT for penalties under the post-horse duty acts. At the trial before *Abbott*, C. J., at the Sittings in *Middlesex*, in *Trinity* Term last, a verdict was found for the plaintiffs for one penalty of 10*l.*, subject to the opinion of the Court upon the following case:—

The plaintiffs are farmers and collectors of the duties payable in respect of horses let to hire within the district comprising the cities of *London* and *Westminster*, and the county of *Middlesex*, and the defendant is a person duly licensed to let horses to hire within the said district.

On the 11th *April*, 1821, *Joseph Chapman* hired of the defendant a saddle-horse for a day, to go from *Little Moor Fields* into the country, and back on the same day, for his pleasure, the distance not being at the time of hiring ascer-

1823.

RAMSDEN v. GIBBS.

tained, and the charge of 9*s.*, which the defendant demanded, was paid.

On the 12th *April*, 1821, the same person hired of the defendant another saddle-horse to be used on that and the following day, for the purpose of riding from *Little Moor Fields* to *Richmond* and back again, the distance being at the time of hiring known to be a distance of twenty miles. The defendant received from him for such hire the sum of 9*s.* At the time of hiring, *Chapman* said to the defendant, "I wish to have a saddle-horse for to-morrow," upon which the defendant asked him where he was going, to which he replied "to *Richmond*," and that he should return in the evening.

On the 13th *April*, in the same year, the same person hired of the defendant another saddle-horse, to be used on the following day, for the purpose of riding ten or twelve miles, the distance not being any further or otherwise ascertained at the time of hiring. The defendant on that occasion charged the sum of 9*s.*, and *Chapman*, at the time of hiring, said to the defendant, "I wish to hire a saddle-horse for to-morrow." To which the defendant answered "very well, where are you going?" and he replied "not more than ten or twelve miles, and I shall return in the evening."

On the 14th *April*, in the same year, the same person hired of the defendant another saddle-horse, to be used on that day, for the purpose of riding for an airing from *Little Moor Fields* into the country, for an hour or two, the distance not being otherwise ascertained, and the defendant charged the sum of 4*s.* At the time of hiring, *Chapman* said to the defendant, "I want a saddle-horse to ride an hour or two, for an airing for the benefit of my health."

On the 21st *April*, in the same year, the same person hired of the defendant another saddle-horse for fourteen days, then next following, to be used for the purpose of riding on a journey, the distance not being ascertained. The defendant upon that occasion charged the sum of 2*l.* 9*s.*, and

at the time of hiring, *Chapman* said to the defendant, "I want to hire a saddle-horse for a journey, and shall be out fourteen days."

The defendant, after he had let to hire the horses above mentioned, delivered in his stamp office weekly account, in respect of other lettings to hire, as required by law, but omitted to account for the duty of 1*s.* 9*d.*, due in respect of the hiring first mentioned; the duty of 2*s.* 6*d.* due for the second; the duty of 1*s.* 9*d.* due for the third; the duty of 1*s.* 9*d.* due for the fourth; and the duty of 1*l.* 4*s.* 6*d.* due for the fifth.

The defendant, before any of the said lettings to hire, duly entered in his return to the assessed taxes the horses so let to hire, and paid the duty of 2*l.* 17*s.* 6*d.* per horse, on each, for the current year.

The questions for the opinion of the Court were, whether the defendant became chargeable with the debt of 10*l.* found by the verdict, or any part thereof, under and by virtue of the said statutes, or any of them, in respect of the horses so hired. If they should be of opinion that the defendant did become chargeable with the whole of the debt, the verdict to stand for 2*l.* If they should be of opinion that defendant was not chargeable with the whole, but only with a part or parts of the debt, the amount to be reduced to such sum as they should be of opinion he became chargeable with; but if they should be of opinion that he did not become chargeable with any part of the debt, then the verdict to be set aside, and a nonsuit entered.

By the schedule to 44 *Geo.* 3. c. 98, which repeals the duties imposed by 25 *Geo.* 3. c. 51, a mileage duty of three halfpence is imposed upon every horse, mare, or gelding, "hired by the mile or stage, to be used in travelling" in *Great Britain;* and a like duty of three halfpence upon every horse, mare, or gelding, hired for a less period of time than twenty-eight successive days, for drawing on any public road any coach or other carriage used in travelling

1823.

RAMSDEN v. GIBBS.

post or otherwise, if the distance at the time of the hiring shall be ascertained; and a duty of 1*s*. 9*d*. on each horse, mare, or gelding, where the distance shall not be ascertained at the time of hiring. By 1 *Geo*. 4. c. 88, which was passed to prevent doubts which had arisen respecting horses, mares, and geldings, let to hire, to be used in travelling in *Great Britain* by the day, it was enacted, "that the duty of 1*s*. 9*d*. imposed by 44 *Geo*. 3. c. 98, upon every horse, mare, and gelding, hired for drawing on any public road any coach or other carriage, as mentioned in that act, shall be deemed to attach and be payable for and in respect of every horse, mare, or gelding, which shall be hired, to be used in travelling in *Great Britain*, in all cases where the distance shall not at the time of such hiring be ascertained; and that when the distance shall be ascertained, the duty of three halfpence for every mile of such distance shall be charged in respect of every such horse, mare, or gelding."

The question raised in argument was, whether in any or all of the instances of hiring set out in the case, the horses so hired were to be considered as horses hired "to be used in travelling," and upon which the duty imposed by the statutes above mentioned were to attach.

Bayly, for the plaintiff, contended, that the second and fifth instances of hiring, set out in the case, were clearly liable to the duties imposed by the 44 *Geo*. 3. c. 98. s. 8, inasmuch as in the former the distance was ascertained (*a*), and, in the latter, the horse was hired to go a journey, which was clearly "a travelling" within the meaning of the statute. As to the other instances, he urged, that though it might be argued that in those the horses were hired for *pleasure*, yet according to the reasonable construction of the 1 *Geo*. 4. c. 88. the duty would attach, notwithstanding *the purpose* for which the horse was hired. Unless the Court could give

(*a*) *White* v. *Beazeley*, 1 Barn. & Ald. 166. *Hanley* v. *Cubberley*, 15 East, 257.

to the word "travelling" some meaning different from that expressed by the statute, it was quite clear that the duties would attach in all the instances stated. The word "*travelling*" was as applicable to the case of a man riding out for pleasure, as if he went a journey, or hired a horse to go a given distance and back again upon business. If he went along the road on horseback, no matter for what purpose, still he would be "travelling" within the meaning of the statute, and the duties would attach.

W. E. Taunton, contrà, conceded that in the second and fifth instances of hiring, set out in the case, the duty would attach, but in the others he insisted that the defendant was exempt from liability. The duties imposed by the 44 *Geo.* 3. and 1 *Geo.* 4. do not attach unless the horse is hired "to be used in travelling." If the horse is hired for pleasure no duty is payable. The 1 *Geo.* 4. does not create a new tax; it was passed only to explain and amend the 44 *Geo.* 3, and the amendment consists merely in imposing the duty of 1*s.* 9*d.* per day where the distance is not ascertained with respect to horses used *in travelling*, in like manner as if they had been used in drawing under the 44 *Geo.* 3; the latter statute having in such case only given a duty of three halfpence per mile for horses used in drawing any coach, &c. used in travelling post or otherwise, where the distance was not ascertained. The question therefore is, what is meant by the words "used in travelling" mentioned in the schedule to the 44 *Geo.* 3. In no one of the three instances of hiring, now under consideration, can it be said that the horses were used in "travelling" in the true sense of that word. In the first, the case finds that the horse was hired expressly for the rider's pleasure; in the second, the hiring was for ten or twelve miles, the distance being no otherwise ascertained; which is also obviously a hiring for pleasure; and the third, was merely a hiring for an hour or two for an airing. By no reasonable construction can it be said

1823.

RAMSDEN v. GIBBS.

that these horses were hired "to be used in travelling," and therefore the defendant is not liable to the payment of any duty in respect of such horses.

Bayly, in reply, re-urged the argument used in the outset.

BAYLEY, J.—This being a question upon the liability to pay a tax, it is necessary that we should look to the words of the act for the purpose of seeing whether the case comes within its operation. Taxes ought not to be imposed, except in such plain and unequivocal terms as leave no reasonable doubt of their application. The 1 *Geo.* 4, is not an act for making a new duty, but for the purpose of amending 44 *Geo.* 3, and the clause in question was enacted in order to prevent doubts which had arisen respecting horses let to hire, to be used in travelling by the day, and the provision is, that the duty of 1*s.* 9*d.* imposed by the 44 *Geo.* 3, upon every horse, &c. hired for drawing on any public road any coach or other carriage as mentioned therein, shall be deemed to attach, and be payable for and in respect of every horse, &c. which shall be hired to be used *in travelling*, in all cases where the distance shall not at the time of hiring be ascertained, but when ascertained, it imposes the duty of three-halfpence for every mile of such distance. It was, therefore, not so much to impose a new duty as to explain what was intended by 44 *Geo.* 3. By that statute there were two duties imposed on draft horses, one of three-halfpence per mile, where the distance was ascertained, and the other of 1*s.* 9*d.* per day, where it was not. In case the horse was hired, not for the purpose of drawing, but of riding, the duty on horses hired by the mile, or by the stage, to be used in travelling post, attached, and then the duty was three-halfpence per mile; but in that part of the clause there was no 1*s.* 9*d.* duty imposed where the distance was not ascertained, and I am satisfied it was only to remedy that omission that

the clause in the 1 *Geo.* 4, was introduced, the object of which was, to put horses hired to be ridden, and used in travelling by riders, on the same footing as horses hired to draw carriages. The words used are, "to be let to hire to be used in *travelling*." In this case there are five hirings, and it is conceded that in the second and fifth instances the duty imposed by the 1 *Geo.* 4, attaches. In the one, the distance is ascertained, and according to the case of *Hanley* v. *Cubberley* (a), must be deemed a hiring for the purpose of *travelling;* and in the other, the horse being hired for a *journey*, there can be no doubt it is to be deemed a hiring for the same purpose. The question then is, whether any of the other cases fall within the statute; and I am of opinion they do not. In the first instance the horse is hired to go into the country and back for "pleasure." The words of the statute "to be used *in travelling*," must be understood to have a meaning in contradiction to other purposes, for which horses may be let; and I think hiring a "horse for pleasure" is one of those purposes, and if a man hires a horse in order to go into the country and back for the purpose of *pleasure*, I am of opinion that he is not to be considered as hiring the horse for the purpose of *travelling*. The third case is, where the horse was hired to go ten or twelve miles, and back in the evening. That certainly might be considered a hiring "for the purpose of travelling," if the party had fixed in his own mind the place to which he intended to go, more especially if he had any business at the place to which he was going; but it being uncertain whither he is going, I think we cannot say that the horse was hired to be used "in travelling." The fourth instance of hiring, is for "an airing into the country for an hour or two," which certainly is a much weaker case than any of the others, and it is impossible to predicate of that, that the horse was hired for "travelling." The verdict, therefore,

(a) 15 East, 257.

1823.

RAMSDEN v. GIBBS.

must be entered for the second and fifth cases only, for the sum of 1*l.* 7*s.*

HOLROYD, J. was of the same opinion.

BEST, J.—In all cases where taxes are imposed, if the words of the statute are not clear, the king's subjects are entitled to the advantage of any doubt that may arise. In this case it appears to me, that the legislature did not think it proper to impose a duty on horses hired for pleasure, for otherwise they would not have added as part of the clause, the qualifying words "to be used in travelling." Unless the horse is used for the purpose of travelling, I think no duty is payable. On this ground it appears to me, that in the first, third, and fourth hirings stated in the case, the duty does not attach. The first is to ride some distance into the country for pleasure. That is clearly not travelling. Suppose a man hires a horse for the purpose of hunting or shooting, it would be impossible to say that that was travelling. The other instances fall under the same observation. The fourth instance is the weakest of all the cases put. There the hiring was for the purpose of riding for an airing into the country. It is quite absurd to call that a travelling. It might as well be said that a man who takes a walk into the country for his health is travelling. That cannot be, and there is no difference between walking for amusement, and riding for amusement. In neither case can a man be considered as travelling, and unless it is travelling, the case is not brought within the statute.

The verdict was ordered to be reduced to the sum of 1*l.* 7*s.*

RAMSDEN and Another *v.* HODGKINSON.

A composition for saddle horses under the assessed tax act, 59 *Geo.* 3. c. 51. does not protect the owner of such horses from liability to pay the duty imposed by 1 *Geo.* 4. c. 88. s. 3, where the same horses are let to hire to be used in travelling.

THIS was also an action of debt for penalties under the post-horse duties acts. At the trial, before *Abbott*, C. J., at the *Middlesex* adjourned Sittings after last *Trinity* Term, a verdict was found for the plaintiff for seven shillings debt, and one shilling damages, subject to the opinion of the Court upon the following case:—

On the 2d *April*, 1821, one *Robert Barnett* hired a saddle-horse of the defendant, "to be used in travelling from *Bury Street, Bloomsbury*, to *Brentford*, being a distance of fourteen miles, and paid defendant for such hire the sum of 10*s.* 6*d.* for the whole distance, and not after the usual or any certain rate per mile. At that time the defendant was assessed for the same horse under the assessed tax acts, and duly and regularly paid a composition for the same. The defendant omitted to account for one-fourth part of the sum so received in his usual weekly stamp office return.

On the 3d *April*, in the same year, another traveller hired another saddle-horse of the defendant by the day, for one day, "to be used in travelling," the distance which the horse was to go not being at the time of hiring ascertained. The defendant was assessed for this horse under the assessed tax acts, and duly and regularly paid a composition for the same; and in his weekly account to the stamp office omitted to charge himself with the duty of 1*s.* 9*d.* due in respect thereof.

On the 5th *April*, in the same year, the defendant let to hire to another traveller, another saddle-horse by the day, "to be used in travelling," the distance which the horse was to go being ascertained at the time of hiring, to be twenty-one miles. During the time mentioned in the declaration, the

defendant was assessed for eight horses, to be let to hire under the assessed tax acts, and duly and regularly paid a composition for the same, according to the form of the said statutes, and the same were duly and regularly returned to the commissioners of taxes in his schedule for the year ending 5th *April*, 1822. In his weekly account to the stamp office, the defendant omitted to charge himself with the duty of three-halfpence for every mile of such distance as the horse lastly above-mentioned was hired to go. The questions for the opinion of the Court were, whether the defendant was chargeable with the debt of 7*s*. found by the verdict, or any part thereof, in respect of the horses so hired, or any or one or more of them, or whether the composition paid for those horses as saddle-horses, exempted the defendant from the payment of the duty charged upon them, and sought to be recovered by the plaintiffs. If the Court should be of opinion that the defendant became chargeable with the whole of the said debt of 7*s*. the verdict to stand. If the Court should be of opinion that the defendant did not become chargeable with the whole, but only with part of the debt, the amount to be reduced to such portion as the Court should be of opinion the defendant became chargeable with. But if the Court should be of opinion that the defendant did not become chargeable with any part of the debt, the verdict to be set aside, and a nonsuit entered.

Bayly, for the plaintiffs, was stopt by the Court.

J. L. Adolphus, for the defendant, contended, first, that the defendant being assessed for saddle-horses let to hire, and having compounded for them by virtue of 59 *Geo*. 3. c. 51, was not liable to pay any duty for the horses in question under the denomination of "horses travelling for hire;" and, second, that the horses, under the circumstances stated in

the case, were not liable to the duty imposed by 1 *Geo.* 4, c. 88, s. 3. But,

Per Curiam.—The composition under 59 *Geo.* 3, c. 51, extends only to pleasure horses used by the owner or his servants, but does not extend to horses let to hire, though the party should compound for the same, and consequently, where a pleasure horse is let to hire, the composition does not operate as a protection against the duty upon horses let for hire. Then, as to the horses in question, the case finds expressly, that every one of them was let to hire, "to be used in travelling." In the last case (*a*), we decided, that where horses are let to be used for the purpose of pleasure and recreation only, they do not come within the operation of 1 *Geo.* 4, c. 88, s. 3, but that where they are let to be used "in travelling," the duty attaches. Here every one of the horses was let to be used in travelling, and therefore in conformity with that decision, the case comes within the 1 *Geo.* 4.

Judgment for the plaintiffs (*b*).

(*a*) *Ramsden* v. *Gibbs*, ante, 617.

(*b*) Vide *Rex* v. *Swift*, 8 East, 584. *Welsford* v. *Todd*, S. B. 580. *Rex* v. *Tooley*, 3 T. R. 69. *Serjeant* v. *White*, 11 East, 530; and *Smith* v. *Moss*, 3 M. & S. 15.

1823.



The KING *v.* The INHABITANTS of ROTHERFIELD GREYS.

Where a minor enlisted into the royal marines, and having been discharged from the service at the end of the war, before he attained twenty-one, returned to his father's family:—Held, that he was not emancipated.

BY an order of two Justices *Thomas Binfield* was removed from the parish of *Tooting Graveney*, in *Surrey*, to the parish of *Rotherfield Greys*, in the county of *Oxford*, and on appeal the Sessions confirmed the order, subject to the opinion of this Court on the following case:—

The pauper was born on the 22d *November*, 1794, in the appellant parish, where his father was settled. In the year 1807 the pauper's father removed with his wife and family, including the pauper, to the parish of *Tooting Graveney*, in the county of *Surrey*, and took a cottage there, which he has ever since held at three shillings a week. The pauper resided with his parents at *Tooting Graveney* till 1813, when he enlisted in the marines, and went abroad in that service. He remained in the marine service till the 8th *September*, 1815, when, in consequence of the reduction of that corps, after the peace, he received his discharge. He returned the same day to his parents at *Tooting*, being then under the age of twenty-one years, and occasionally resided with them, working as a labourer on his own account, from that time until some time after the pauper's father hired a stable in *Streatham*. About a year after the pauper's return home, the pauper being then more than twenty-one years of age, his father hired a stable in the adjoining parish of *Streatham* at four shillings a week, which he held about nine months, still continuing to reside at the cottage at *Tooting Graveney*. The cottage and the stable together were above the annual value of 10*l*. The pauper had never done any act to acquire a settlement for himself. The question for the opinion of the Court is, whether the pauper was emancipated at the time of his father's gaining the settlement in *Tooting*

Graveney. If so, the order of removal to be confirmed, otherwise the order to be quashed.

1823.

The King v. The Inhabitants of Rotherfield Greys.

Thesiger, in support of the order of Sessions, contended, that the pauper was emancipated by entering into the marine service, whereby he contracted a relation wholly inconsistent with parental control. This case was distinguishable from any hitherto decided, inasmuch as here the pauper had entered into the regular service, and was for life liable to be called upon at any time to perform his military duty. In this point of view all parental control merged in the contract into which the pauper had entered with his sovereign, and nothing could restore him to the parental dominion. None of the cases of settlement under the head of emancipation would govern the present. Could the father in this instance claim his son, or prevent him from performing his duty as a marine when called upon? If not, then his situation was repugnant to the idea of parental control. The cases of *Rex* v. *Walpole St. Peter's* (a), and *Rex* v. *Stanwix* (b), were distinguishable from this, because in both the paupers had respectively attained majority before they returned to their father's family. The latter case, indeed, was decided upon a different ground, as was observed by Lord *Kenyon* in *Rex* v. *Witton-cum-Twambrookes* (c), namely, that the pauper had contracted a relation inconsistent with the idea of a subordinate situation in the father's family. This distinction was also taken in *Rex* v. *Roach* (d). The recent case of *Rex* v. *Wilmington* (e), if any thing, was rather an authority in favour than against the present argument, because there *Abbott*, C. J. in enumerating the different modes by which emancipation was effected, observed, "that there is no emancipation during minority, excepting by marriage, becoming the head of another family, or contracting a rela-

(a) Burr. S. C. 638. 2 Bott. 35.
(b) 5 T. R. 670.
(c) 3 T. R. 355.
(d) 6 T. R. 267.
(e) Ante, vol. i. 140.

1823.

The King v. The Inhabitants of Rotherfield Greys.

tion such as *wholly and permanently* to exclude the father's control." Trying this case by the last-mentioned test, it was clear, that the pauper had entered into an engagement which had emancipated him wholly and permanently from the father's control, inasmuch as he had rendered himself liable to the control of the crown during life. The question in this case was, whether enlisting into the army, when it was considered that the pauper was liable to serve for life, and it not being contemplated at the time that he would ever return to his father's family, did not constitute a complete and perfect emancipation. The Court were merely to look to the contract at the time it was entered into, and not to the subsequent circumstances which happened to release the pauper from the obligation into which he had entered. In this case undoubtedly the pauper happened to be discharged from the marines before he was twenty-one, but that would make no difference in the application of the principle now contended for, because the Court must look to the nature and effect of the contract at the time it was entered into. Enlisting into the army was contracting a relation which destroyed the parental control, and effected a complete emancipation, though the pauper might afterwards return to his father's family. The case of *Rex* v. *Woburn* (a), did not shake this principle. In that case the pauper enlisted as a drummer in the same regiment of militia in which his father was a serjeant, and the Court held, that he was not emancipated, but for a plain reason, namely, that the enlistment was merely a temporary suspension of the father's control. Here the pauper had enlisted in permanent service as a marine, and had the prospect of being a soldier for life. In that respect the difference between the militia and the regular service was apparent, for in the one the contract was to continue for life, but in the other it was only for a given time, and the soldier was only called upon occasionally to do duty. This distinction was taken in *Rex* v. *Woburn*; and

(a) 8 T. R. 479.

1823.

The King v. The Inhabitants of Rotherfield Greys.

the case f *Rex* v. *Hardwicke* (*a*), decided, that even the service of a militia-man *until* the age of twenty-one worked emancipation.

Barnewall, on the other side, was stopped by the Court.

Bayley, J.—It is quite clear in this case that the pauper did not contract such a relation as effected his emancipation. In order to constitute emancipation, the son is to be wholly and permanently free from the father's control. Entering into the army, subjects him to the control of the crown, so long as he continues in that service; and if he remains in the army until after he is of the age of twenty-one, then his emancipation is perfect, and it would relate back to the time when he originally enlisted; but if before he attained majority he was released from the service, though he became sui juris with respect to his military engagements, yet he would become liable again to the control of his father; and if he returned to his father's roof, he would become a member of his father's family, and consequently remain unemancipated. If reference is had to the old authorities, the principle will be found to be uniformly the same. The opinions of Lord *Kenyon* and *Lawrence*, J. in *Rex* v. *Roach* are perfectly consentaneous with this doctrine, and in unison with the general rule laid down in the recent case of *Rex* v. *Wilmington* by *Abbott*, C. J., who was extremely desirous of doing that which in all settlement cases is most desirable, namely, of laying down something like a plain and general rule, which should not be open to nice exceptions. He says, " It is of great importance to lay down some general rule upon this subject, in order to exclude discussions of this kind in particular cases, and I own it appears to me, the best general rule to lay down is, that there is no emancipation effected during minority, excepting by marriage, becoming the head of another family, or con-

(*a*) 5 B. & A. 176.

1823.
The King v. The Inhabitants of Rotherfield Greys.

tracting a relation such as *wholly and permanently* to exclude the father's control." Entering into the army is certainly contracting a relation which will wholly and permanently exclude the parental control, provided he remains in the service until after twenty-one; but if he be discharged from the service before he attains that age, and returns again to the father's family, then he has not contracted a relation (according to the events which afterwards occurred) which wholly and permanently excluded parental control. So that, according to the spirit of that decision, this pauper could not be emancipated. In the case of *Rex* v. *Hardwicke*, where the pauper served in the militia for five years, my Lord Chief Justice says, "The rule of law is, that every new settlement acquired by the parent is communicated to the children, so long as they remain members of his family; and the question in this case is, whether, at the time when the father gained his settlement in *Stanton Harcourt*, this pauper remained a member of his family? Now, *during the minority of the child, he will remain almost under any circumstances unemancipated*; but where the new settlement is acquired by the parent after the child has attained twenty-one, it will not be communicated, unless in fact the child continues one of the family." In this case, the pauper is for a time taken from under the parental control; but being discharged from the marines, and being then under the age of twenty-one, he willingly submits himself to the control of his father. According, therefore, to the authority of that case, he continues a member of the family, and consequently his father's settlement is communicated to him. On these grounds, the order of Sessions must be quashed.

Holroyd, J.—I am of the same opinion. I think the son cannot be considered as emancipated, inasmuch as he had returned to the parental control before he attained twenty-one. The father by law has a right to the control of his child until he is of age, unless some other engagement

entered into deprives him of such right. Entering into the army may be considered as an engagement for life, inasmuch as no definite period is mentioned at the time of enlistment, and the party could not leave without the consent of the Crown. If the soldier remained in the service until twenty-one, he would then be completely separated from his father's family, and a perfect emancipation effected; but the ground on which we decide that there is no emancipation in this case is, that before twenty-one the pauper was discharged from his engagement, and returned again to the father's control. So that by mere enlistment the father's control is not wholly gone; it only remains in abeyance, and therefore if by any accident the infant is released from his engagements to the Crown before twenty-one, the father's control revives, and the emancipation is not affected. It is argued, that by enlistment the pauper rendered himself liable to serve for life, and thereby the emancipation became complete. The enlistment, however, is not to be considered in that light. When the soldier enlists, he is undoubtedly liable to serve for life; but it does not follow that he will be called upon so to do; for the Crown may think fit to discharge him from the engagement entered into; and in that case it is not a service for life, but only for such period of time as public exigencies may require his services. If it were to be considered as an engagement to serve for life at all events, there might be some weight in the argument; but as the engagement may or may not last, according to circumstances, I think the observation falls to the ground. Here the pauper is released before twenty-one, and therefore, with respect to the law of settlement, he stands in the same situation as if he had never been in the marines.

BEST, J.—I think the pauper was not emancipated at the time his father acquired his settlement in the parish of *Tooting Graveney*, and therefore the order of Sessions must be quashed. There is no doubt, that by the policy of *English*

1823.

The King v. The Inhabitants of Rotherfield Greys.

law, the parental authority continues until the child attains twenty-one; but by the policy of the same law, if the country requires the services of the infant, he is at liberty to contract an engagement paramount to the parental control, and subject himself to the dominion of those persons who are put in authority over him. That engagement may or may not last for life; but if it is dissolved before twenty-one, the parental authority comes again into operation, and the son continues, for the purpose of settlement law, a member of his father's family. The pauper in this case comes precisely within the scope of this principle, which is fully supported by the cases of *Rex* v. *Roach* and *Rex* v. *Wilmington*.

Order of Sessions quashed.

The King *v.* The Inhabitants of Ferrybridge.

Where firs and larches were planted with oak and ash trees, principally for the purpose of affording a screen or shelter to the latter in their infancy, and were cut from time to time as the oaks and ashes required more room to spread, and when once cut did not spring again, and although, when sold, they yielded a profit:—Held, that they were not *saleable underwood* within the statute 43 *Eliz.* c. 2. and therefore not rateable to the relief of the poor. *Qu.* Whether under any circumstances firs and larches can be considered underwood?

ON appeal by *Richard Rhodes Milner*, Esq. against a rate or assessment for the relief of the poor of the township of *Ferrybridge*, in the West Riding of *Yorkshire*, the Sessions ordered the rate to be amended, by striking out a portion of it, assessed upon the appellant, amounting to the sum of 16*l.* 16*s.* 10*d.* in respect of his woods and plantations, subject to the opinion of this Court upon the following case:—

The appellant is the occupier of 650 acres of land in *Ferrybridge*. It appeared in evidence, that in the years 1785 and 1786, 340 acres of the said land were planted with oak and ash, closely intermixed with *Scotch* firs and larches. At different periods, portions of the firs and larches were cut down for the purpose of thinning the

1823.

The KING v. The INHABITANTS of FERRY-BRIDGE.

plantations, and some of these thinnings were sold under the name of fir and larch poles, but the greater part were used in the erection of buildings. Considerable thinnings of the firs and larches have been made within the last four years, and produced a profit. Many of them were of the height of from thirty to forty feet, and contained from ten to twelve cubit feet of wood, and were thirty years old. This wood was cut without reference to size, in order to allow room for the oaks and ashes to spread. The purpose of introducing firs and larches into these plantations was to keep the same thick and sheltered, and to make a profit by cutting the firs and larches from time to time, when the oaks and ashes, by reason of their growth, required more open space. Fifteen years ago, eighteen other acres of the said land were planted in a like manner; and five years ago seventeen other acres of the said land were also planted in a like manner. The eighteen acres had been thinned by cutting out a portion of the firs and larches, but no profit was derived from such thinning. The seventeen acres have not yet been thinned. The roots or boles of the firs and larches which are cut, die in the ground and produce no shoots. The whole of the land so planted has always been rated to the relief of the poor. Upon these facts the Court of Quarter Sessions was of opinion that this was not that species of wood liable to be rated to the relief of the poor, and directed the rate to be amended by striking out such part of it as was assessed upon the said appellant in respect of the whole 375 acres.

E. Alderson (with whom was *Bland*), in support of the order of Sessions. The question is, whether the fir and larches mentioned in the case, are saleable underwoods within the meaning of 43 *Eliz.* c. 2. According to decided authorities they clearly are not. In *Rex* v. *Mirfield* (*a*), and *Aubrey* v. *Fisher* (*b*), questions respecting saleable

(*a*) 10 East, 219. (*b*) Id. 216.

1823.

The King v. The Inhabitants of Ferry-bridge.

underwood came under the consideration of this Court. Lord *Ellenborough*, C. J. in the former case, speaking of saleable underwoods, within the meaning of the statute of *Elizabeth*, says, "amongst the several descriptions of persons whom this statute makes rateable, the occupier of *saleable underwoods* is one, and the question is, whether they can be deemed *saleable* underwoods except in the year in which they are cut down. The word *saleable* has not a very precise definite meaning; it may mean when they are in a fit state for sale, referring to the time when they are cut; or it may mean such as are intended or destined for sale, in contradistinction to such as are to supply the land with estovers for fuel, and the other purposes of the estate. In the former of these cases they would only be rateable in the year in which they are cut; in the latter they would be rateable at all times; and we think, after full consideration of the subject, that the latter is the proper meaning." According to this definition, saleable underwoods are those only which are originally destined for sale, and the primary object of planting which is, sale, when they are fit to cut. In this view of the case, a definite and precise meaning is given to the words "saleable underwood." This means not such woods as may happen in fact to have been sold, but such as are saleable. To bring this case within that definition, therefore, it must be shewn, that the original intention of cultivating the land in this manner was with a view to sell the firs and larches when they were cut. Now the fact is, that the primary object was not to derive a profit by the sale, but to afford a protection or screen to the young oaks and ashes, planted for the purpose of becoming timber. In the case of *Aubrey* v. *Fisher*, the question was, whether beech trees in *Buckinghamshire* were saleable underwood according to the custom of that county. Upon the trial, *Heath*, J. told the Jury, that the only question for their determination was, whether the plaintiff's wood was saleable underwood; and

as all the witnesses agreed that it was not underwood at all, and was differently managed, and clearly distinguishable from underwood, they ought to find a general verdict for the plaintiff, which they accordingly did. There, the question chiefly turned upon the mode of management, and as it appeared that the practice was to cut down the larger, and leave the smaller wood, it was held that the trees in that case were not underwood. Considering the mode of management, therefore, as the criterion, it is quite clear that the firs and larches in this case cannot be deemed underwood. Here the larger trees are cut down, in order to leave room for the oaks and ashes to grow up as timber. Undoubtedly they are not thrown away as useless; but admitting that they were sold, still the fact of sale does not make them saleable according to the definition given in *Rex* v. *Mirfield*. The Court are to look to the original intention of planting. It is clear, that they were not originally intended for sale; they were planted for a totally different purpose, a purpose inseparable from the principal object, namely, the cultivation of the timber trees. The mode of management shews clearly that the proprietor of the land never intended them as an object of sale. They are not cut with reference to their own growth, but entirely to that of the timber trees, in order that additional room may be given to the latter when it becomes necessary. If it were intended by the proprietor to derive a profit from the sale of the firs and larches, a very different mode of management would have been adopted. Instead of cutting them down at uncertain periods according as the timber trees grew up and required more space, he would have felled them at stated periods, and standards would have been left at certain intervals. But the very nature and character of this species of wood negative the notion of underwood. When the firs and larches are once cut, the trees are absolutely destroyed, and the bole dies in the ground, never again to shoot. This is an important view

1823.

The King v. The Inhabitants of Ferry-bridge.

of the case, when considered with reference to the statute 35 *Hen.* 8. c. 17, which was passed for the preservation of woods, and was made perpetual by 13 *Eliz.* c. 25. That statute prescribes the mode in which coppice or underwoods shall be managed, and there is an express provision made for the preservation of what are called the springs of the wood from which the underwood is to be renewed. This can never be construed to apply to fir trees, which are known never to grow again when once cut down. The total annihilation of the fir tree, when severed from the root, was indeed the subject even of a proverb amongst the ancient *Greeks.* It is obvious, therefore, that when these statutes speak of underwoods, they refer entirely to woods of a renewable nature, and not such as are perishable. Firs and larches are clearly not renewable, and therefore do not fall within the scope of those statutes. The legislature, at the time the 43 *Eliz.* was passed, must also have had this in contemplation when they used the words "saleable underwoods," because the object of that statute is only to make such property rateable as yields an annual profit. [*Bayley,* J.—Coal mines are included.] They are mentioned specifically, but though they may not, strictly speaking, produce an annual profit, yet they are a species of property upon which an annual computation of profit may be made, so as to make them the subject of a rate; and that is one of the reasons assigned in the books why they are liable to an annual rate. Upon the same principle sand pits, lime pits, and other property of that description are rateable. They are made the subjects of rate because their annual value is matter of easy calculation. Now in this case, how is the annual value of the firs and larches to be estimated? They are not cut at stated intervals, but according as the oaks and ashes require more room. They do not yield an annual profit, and unless they do they are not rateable; for, according to *Rex* v. *Mirfield,* they are rateable according to their annual value, and not with reference to the year in which they are felled. Here it is impossible

to fix any annual value upon which the quantum of rate can be assessed, because there is no certain rule for felling. In one year, only a few may be cut, and in another a greater number, but in every instance the motive for cutting is the due cultivation of the oaks and ashes. When an oak happens to be incumbered by a fir, the latter is immediately cut down, whether it be great or small.

The Court stopped him, and called upon

Milner in support of the rule for quashing the order of Sessions. Firs and larches, managed in the way stated in this case, are rateable to the relief of the poor within the statute of *Elizabeth*. The Court are now called upon, for the first time, to decide that every species of wood which is not *timber*, is not liable to be rated. In the cases of *Aubrey* v. *Fisher*, and *Rex* v. *Mirfield*, that point did not come under consideration; they were decided upon their own peculiar merits, without involving the general question. With respect to the mode of management, as the criterion of determining what is and what is not underwood; the case of *Aubrey* v. *Fisher*, as far as it goes upon that point, is an authority in favor of the present argument, because it was there said, that " the beech poles could not be considered saleable underwood, but timber, because there the larger wood was cut down, and the smaller was left to grow." No distinction is made here as to the uses to which the firs and larches are to be put. The plantation is made of oaks and ashes, and the firs and larches are merely subsidiary, being planted for the purpose of sheltering the former, and also to make a profit by the sale of them. The firs and larches are managed in the usual way, and are cut down year after year. During the last four years it is found by the case, that they were regularly cut and sold at a profit. Upon this state of facts the question is, whether such wood is not liable to be rated. The policy of the

1823.

The King v. The Inhabitants of Ferry-bridge.

statute of *Elizabeth* is to make as much property as possible rateable to the relief of the poor, and the Court will give effect to that object in the present case. They will not draw nice and subtle distinctions, but will establish one general rule, which shall include all descriptions of productive property, so that the burthens of the parish shall be equally divided amongst the inhabitants. If the Court should hold in this instance, that firs and larches are not rateable, the consequence may be very injurious to the other parishioners, for if the proprietors of poor lands find that this is the most profitable mode of managing their estates, and they can thereby exempt themselves from poor-rates, one-half of the parish may be turned into such plantations, and the burthen of maintaining the poor will be thrown upon the other half. The principle running through all the decisions upon this statute, is to extend it to every species of property which can be fairly included within its operation. This has been the principle governing the Court in questions as to the rateability of mines, tolls, and other productive property of that description. If it be conceded, then, that firs and larches are productive property, there seems to be no sensible reason why they should, more than any other property, be exempt from rateability. Under the words "saleable underwood," may be comprehended every species of wood which is not *timber*, either by the common law of the land, or the custom of the country. There is no custom stated in this case, that firs and larches are timber. Some trees may be timber according to the custom of the country, though not so at the common law, and unless it is found in this case that firs and larches are timber by the custom, the Court cannot infer it from the uses to which they may happen to be applied. The popular meaning of underwood cannot govern this case; the Court must have regard to its meaning as found in the common and statute law. There is a distinction taken in the statute 45 *Edw.* 3. c. 3. between "silva cædua" and "gros bois." That sta-

1823.

The King v. The Inhabitants of Ferry-bridge.

tute recites, that "at the complaint of the great men and commons, shewing, by their petition, that whereas they sell their great wood of the age of twenty years, thirty years, forty years, or of greater age, to merchants, to their own profit and in aid of the king and his wars, parsons and vicars of holy church, implead and draw the said merchants in the spiritual court for the tithes of the said wood, in the name of these words called 'silva cædua,' whereby they cannot sell their woods, to their great damage, &c." and then enacts, "that a prohibition shall be granted as to gros bois." In commenting upon this statute, Lord *Coke*, in 2 *Inst.* 643, gives the definition of those woods to which it is applicable. He says, "It appeareth before that, all the bishops claimed only tithes *de subbois*, of underwood under the name of *silva cædua*, so as of *haut bois* of great wood, no tithes were claimed, but herein rested two doubts, 1. What should be said high or great wood; 2. Of what age the same should be, because it is parcel of the inheritance." In continuation he observes, "and it is to be understood that this act useth these words *grosse boyes*, and not *haut boyes* or *graund boyes*, which word is also used in the books of 50 *Edw.* 3. and 9 *Hen.* 6.; and in this act this word *grosse* signifieth specially such wood as hath been, or is either by the common law or custom of the country timber, for this act extends not to other woods, that have been or will not serve for timber, though they be of the greatness or bigness of timber." From this it appears, that all wood which is not timber either by common law, or the custom of the country is titheable, and therefore comes under the definition of silva cædua or underwood. By the common law oak, ash, and elm only are timber. Where, by the custom of the country, other woods, such as birch, aspen, horsechesnut, &c. are said to be timber, the question is to be tried by an issue. *Walton* v. *Tryon* (a), *Bibye* v. *Huxley* (b), and *Com. Dig.*(c).

(a) 2 Gwill. 827. S. C. Ambl. 130.

(b) Bunb. 192.

(c) Tit. Dismes, H. 3.

1823.

The KING v. The INHABITANTS of FERRY-BRIDGE.

It is not the use to which the wood is put which makes it timber; for timber or not timber depends upon the custom of the country. *Rex* v. *Minchinhampton* (*a*). To whatever purpose it may be applied, does not alter its character, unless it be either timber by the common law, or timber by the custom of the country. Neither does the age of the wood make any difference. In *Goodall* v. *Perkins* (*b*), it was held, that alder-poles, though of trees above twenty years standing, were not timber, but titheable as silva cædua. So in *Turner* v. *Smith* (*c*), stub-oak, and ash above thirty years old, which were not considered timber in the county of *Essex*, were held to be titheable. But the substantial question in this case is, whether a profit has been made of these trees. It is expressly found that for the last four years a profit has been made of them, and it signifies little to what purposes they have been applied, whether to building, husbandry purposes, or sale. In *Chambers's Cyclopædia* and *Jacob's Law Dictionary*, the definition given of underwood, includes coppice and all other woods not accounted timber. These and the other authorities referred to, go to shew that the Court are not bound by any technical understanding of the words "saleable underwood;" nor tied down by any statuable definition of underwoods. It is sufficient if these trees produce a profit to the cultivator, to bring the case within the statute of *Elizabeth*, which in modern times has received a liberal construction, with a view to the equalization of parochial rates. Considering, therefore, the extent to which plantations of this description are carried, and that if these trees are not held rateable, the whole burthen of the poor-rates may be thrown upon the rest of the township; considering also, that whether the Court looks to the strict definition of underwood, or to the implied exemption, these trees, under the circumstances of the case, may fairly be considered as saleable underwoods, and therefore rateable to the relief of the poor.

(*a*) 3 Burr. 1308. (*b*) 2 Gwill. 543. (*c*) Ibid. 529.

Bayley, J.—I am of opinion that the order of Sessions must be confirmed. The statute 43 *Eliz.* c. 2, does not throw the charge upon every description of property, but points out particular descriptions which are to be subject to the poor-rates, and those are " lands, houses, tithes impropriate, propriations of tithes, coal-mines, or *saleable underwoods.*" The statute does not use the word " *underwoods*" per se, but adds the qualification "*saleable.*" Now, if before that act, there had been any statuable exposition of the word " underwood," or if that term had, from time to time, occurred in different acts of parliament, so that the Court could have seen in what sense the legislature had used it, then we should apply it in the same sense in construing this statute. But the industry of the defendant's counsel has not enabled him to find that word occurring, so as to give it a legislative meaning, prior to the statute to which our attention is now directed. It has been argued that all wood, not being timber by the common law, or the custom of the country, must be considered underwood, and consequently as firs and larches are not timber, they must be treated as underwood. Whether that is such a view of the subject as properly applies to the statute of *Elizabeth,* it is not necessary in this case to decide, because that statute does not speak of underwood per se, but of *saleable* underwood. If the definition urged in this case be correct, it would bring under charge a great number of trees which never have, in the general understanding of the word, been considered underwoods, and rateable under that denomination. According to this definition, lime trees, avenues of horsechesnuts, and aspen might be considered underwood. So of other descriptions of trees, such as plane trees, maples, and hornbeams, which, generally speaking, have never been considered as falling within that description. Certainly, according to my understanding of the word, I should have thought it a perversion of language to call these underwoods. I know what coppice wood is, and I know, that

1823.

The King v. The Inhabitants of Ferry-bridge.

generally speaking, coppice wood and underwood are used synonymously, and that the application of these terms is in a great degree governed according to the purposes for which the wood was intended, and the objects to which it is applied. Common underwood is a description of wood which grows expeditiously from one and the same stool, and from which a great many different shoots arise in succession, and cutting down which does not destroy the principle of vegetation, but leaves the roots to send up a fresh supply of stems. In the general understanding of mankind, I believe that is the definition of underwood, and I am disposed to think that that is the description of underwood to which the statute of *Elizabeth* properly applies. But whether that be so or not, we find the word *saleable* in that statute, and I think by the words "saleable underwood," which were under consideration in *Rex* v. *Mirfield* (*a*), we are not to consider that as saleable underwood which is in a fit state to be sold, but such as was originally intended or destined for sale, in contradistinction to such as was to be used for fuel, and other purposes of the estate. I am of opinion, that the proper construction of the words "saleable underwoods," is that description of underwood, of which, at the time it is originally planted, future sale is one of the main objects of its culture. When, therefore, we find that it is clearly destined for a perfectly different purpose, I think we are not at liberty to consider it as coming within the denomination of saleable underwood. There are many places in which from the nature of the wood, it can only have been intended for underwood. Hazels, for instance, can never be intended, and from their nature cannot grow up, to be large trees, and yet are extremely valuable for underwood. Where there are large plantations of this description, the very nature of the wood imports that they must have been planted for profit by sale, and that, sale, was the chief object of their cultivation. But what is the case with respect to firs and

(*a*) 10 East, 219.

larches? Trees of that description are, I believe, the least valuable which can be planted. In general, the principal object of planting them is for the purpose of shelter, and not of deriving profit by sale. This case finds expressly that the original object of planting the firs and larches was to afford protection to the oaks and ashes, which are trees of a slower growth, and require shelter in their infant state. Shelter and protection were therefore the primary objects. When the larches and firs are cut, what is the purpose in view? They are cut for the purpose of thinning the plantation and giving more space to the oaks and ashes in their progressive growth. It is conceded then, that they are not cut expressly with a view to sale or profit. If these were the objects, and the proprietor wished to cut down his firs and larches when the price was high, what would be the consequence? His oaks and ashes would be exposed to the weather, and the most valuable part of his plantation, perhaps, destroyed. But it is quite obvious that these trees were planted merely for the purpose of shelter in the first instance, and of thinning when the young timber trees required more space. Some of these trees, it is true, were sold for profit, and it appears that many of them were from thirty to forty feet high. Certainly trees of such a height do not accord with one's notion of underwood, in its popular sense and acceptation. But we are not to consider this case with reference to the height of the trees, nor to the actual purpose to which they have been applied when cut; we must look to the primary object for which they were originally planted. It is quite clear that profit was not the sole, nor even the principal object of planting these trees, and the fact of afterwards selling does not make it saleable underwood within the statute of *Elizabeth*. I think it would lead to the most mischievous consequences, if property of this description were held liable to be rated. It is a great national purpose to encourage the growth of timber. The proprietor of an estate, when he

1823.
The KING v. The INHABITANTS of FERRY-BRIDGE.

dedicates his land to the growth of timber, foregoes all present profit, and looks to remuneration at a distant period. If this is to be considered saleable underwood from the time it is planted, then, according to *Rex* v. *Mirfield*, it must be rated not merely in the year in which it is cut down, but in every year in which it is growing. Such a result would be most injurious and unjust. Here the proprietor of an estate devotes 340 acres of his land principally to the growth of timber, and, with a view to encourage the growth, he plants, at an enormous expence, a considerable quantity of fir and larch. Is he then to incur not only that expence, but also to subject himself to an annual charge upon the firs and larches, when the period is far distant when he will derive any profit from his plantation? I cannot think it was the intention of the legislature, in passing the 43 *Eliz.* to bring into charge property of this description. In general, that statute seems to contemplate that description of property which annually yields a profit. This is property which in general yields no annual profit. It may be true that the firs and larches were originally planted partly with a view to profit, but the main object was the protection of the timber. For these reasons it appears to me, that, whether this be underwood at all or not, it is not to be considered *saleable* underwood within the meaning of the statute.

HOLROYD, J.—From the statement of this case, it appears to me that these cannot be considered "saleable underwoods" within the meaning of those words as used in the statute of *Elizabeth*. Considering those words in the sense in which they are there used, I apprehend they must be understood in their general and popular sense, unless it can be made to appear from other parts of that statute, or from other statutes, that they were intended to have a more extensive construction. It has been argued, with great ingenuity, that under the denomination of underwood is to be

taken all wood which is under the quality of timber, and has not become timber. I cannot agree with that argument; for, according to the decision of the Court, in *Rex* v. *Mirfield*, that notion was never entertained. It certainly is not agreeable to the general understanding of the word. The term "underwood," according to general understanding, is more applicable to what is called coppice wood, in contradistinction to *hautbois* or high wood, and is not considered as extending to all wood which is not timber. The great division is *hautbois* and *subbois*. There are three species of wood, which, by the common law, are timber, oak, ash, and elm; but if the enlarged interpretation now attempted to be given to the word "underwood" were to prevail, it would extend to beech, aspin, horse-chesnut, lime and walnut trees, in those places where they are not timber by the custom of the country. I think, however, that the construction of the word is not to be taken to this extent. But even if firs and larches came within the definition of underwood, still if they did not satisfy the description of "*saleable*" underwood, they would not be rateable under the statute of *Elizabeth*. Now if we look to the different objects of rate in that statute, they are such as generally yield an annual renewal of profit. That may be said even of a coal mine; for when once it is opened, it affords a renewal of profits as long as it is worked. Underwoods are in general considered as yielding an annual profit; and though in fact they are not cut annually, yet there are successive renewals of profit, upon which a rate may attach. Firs and larches are clearly not underwood in this point of view, because when once they are cut, the roots die in the ground, and there is no renewal of profit. One mode of ascertaining whether these can be considered saleable underwoods, is to look to the objects to which they are applied, and the mode of management adopted from time to time. Now the case finds, that the principal object of planting was to afford shelter and

1823.

The KING v. The INHABITANTS of FERRY-BRIDGE.

protection to the oaks and ashes, which are more valuable trees. When the firs and larches were cut, it was not to make a profit of them, but expressly for the purpose of giving more space to the young timber trees. It may be true, that the thinnings were carried to a profitable account, but the main object of thinning the plantation was in aid of the cultivation of timber trees, to which the proprietor looked as the principal source of advantage. Occasional profit seems only to have been derived; for on one occasion, when eighteen acres were cut, no profit was made of them. This fact shews that the original purpose of planting them was not *solely* with a view to profit, but principally as a shelter for the oaks and ashes. Therefore, even supposing the trees came under the denomination of underwood, still they are not *saleable* underwood within the meaning of this statute, and are consequently not rateable.

BEST, J.—I am of the same opinion. It has been urged very properly, that the statute of *Elizabeth* ought to receive as extensive a construction as possible, because by extending its operation, and embracing more rateable objects, the burthen of parochial taxation will be more equalized. I entirely concur in the truth of that observation, and if the legislature could have contemplated at the time this statute was passed, that new descriptions of property would have come into existence, it is highly probable that terms more extensive than the statute contains, would have been introduced to embrace this description of property. But we are to construe the statute as we find it. The statute only applies to such property as in fact produces, or may be considered as producing, some annual profit. The subjects enumerated are lands, houses, tithes impropriate, propriations of tithes, coal mines, or saleable underwoods. It is to be observed, that when this statute was passed, saleable underwoods were much more in use than at present. At that period, underwood constituted the chief fuel of the

country, and was cultivated in great abundance in the neighbourhood of towns. In more modern times, coal has been brought into use, and underwoods have been grubbed up, and the land turned to a more useful account. The first four subjects of rate mentioned in the statute, are clearly such as yield an annual profit. Why coal mines were so specifically mentioned may reasonably be accounted for. When the framers of the act proposed to rate underwood, it was no doubt upon the principle that it produced an annual profit. Upon which, it would be very naturally suggested, "If you rate underwood, why not rate coal mines, which produce a profit to the owner of the soil." It is highly probable that it was upon some such suggestion as this, that coal mines were introduced into the statute. Coal mines, when worked, do produce something like an annual profit, and are therefore very properly the subject of rate. Now the question arising in this case is, what description of underwood was meant by the legislature when the statute was passed. It is argued, that every species of wood which is not, properly speaking, timber, must be considered underwood, and therefore rateable. I think the true construction of this statute will not support that argument. The legislature have expressed themselves most accurately for the purpose of shewing what they intended. They have not confined themselves simply to the use of the word "underwood"; for if they had, that would have let in the argument now urged; but they have qualified the use of the term "underwood," by introducing the word "saleable," thereby shewing that they did not mean every species of wood which is not timber. By the words "saleable underwood," is clearly meant that description of wood which, when once planted, and after being cut, produces new shoots, which at regular, certain, and known periods, may be cut down and sold for a profit. These are the sorts of wood which were contemplated, and which come as nearly to an annual produce as possible. The legislature

1823. The King v. The Inhabitants of Ferry-bridge.

never could intend by these words, to comprehend perishable trees, which, when cut down, are no longer profitable, producing no new shoots, and yielding no renewal of profit from the stools. It is true in this case, that the cuttings of the firs and larches produced a profit; but it is not every thing that produces a profit which is rateable. The wood which is to be rated is that upon which a profit can with some degree of certainty be calculated at the time when it is planted. From underwood, properly so called, the cultivator may calculate, with some degree of certainty, upon deriving a profit; but that is by no means the case with respect to firs and larches. Now here the cultivator of the firs and larches did not originally contemplate a profit by the sale of them. He did not plant for the purpose of sale merely. It is found in the case, that they were planted expressly for the purpose of nursing the young timber trees, which would be destroyed by the wind, unless they had the protection of other trees of a quicker growth. Profit may undoubtedly have been made of them, but that was a secondary consideration; the primary object was the cultivation of the timber, to which the proprietor looked as the source of remuneration for his trouble and expence. I agree with my Brother *Bayley*, that if this species of property were to be made the subject of a poor rate, it would have a direct tendency to check the cultivation of timber, because no man would embark his property in undertakings of this nature, which hold out only a remote prospect of advantage, if in the mean time his plantation is to be subject to a permanent rate. It has been argued, that this case may be compared to the liability to pay tithes. This is not at all like a case of tithes. Every species of wood which is not timber by common law or custom, is titheable; but there cannot be a custom to impose poor rates upon a species of property which was never considered a subject of rate. No resort has been had to any other definition of underwood, than that which is given

by Lord *Coke*; but I think that definition does not help the argument. We all know that underwood is generally let to the tenant of a farm, and when that is the case, a stipulation is introduced into the lease that the tenant shall be at liberty to cut underwood at ten or fifteen years' growth; but could it be argued, that within the spirit of this permission, the tenant might cut down his landlord's fir plantation? In such a case a Judge would, I apprehend, have no difficulty in telling the Jury that fir plantations did not come within a licence to cut underwood. If, however, this is to be considered underwood, still it is not *saleable* underwood within the statute, and cannot be rated.

Order of Sessions confirmed (*a*).

(*a*) See Year Books, 40 Edw. 3. 25. 42 Edw. 3. 6. 50 Edw. 3. 10. 7 Hen. 6. 38. 11 Hen. 6. 1. Stat. 35 Hen. 8. c. 17. s. 13. Godb. 4. Cro. Eliz. 1. 413. 4 Rep. 31. Moore 355. Co. Lit. 58. Jenkin's Cents. 274. Cro. Jac. 514. Moore 812. and Bro. Abr. tit. Waste, 21.

The King *v.* The Mayor, Aldermen, and Capital Burgesses of the Borough of Sudbury.

Where a corporation, consisting of a mayor, aldermen, and twenty-four capital burgesses, was seised in fee of certain pasture lands, and appointed a ranger to keep the keys of the gates, cleanse the ditches, preserve the fences, impound cattle trespassing, &c.; and by a Court of Orders and Decrees regulations were annually made concerning the right of common to be exercised by the freemen, as to the number of their cattle to be turned on, the time to be turned on, and the price to be paid for each head, which price was always paid by the freemen exercising the right, to the treasurer of the corporation, and which money, after deducting the expence of management, was distributed among the poorer burgesses, who had no cattle to depasture:—Held, that the corporation were liable to be rated to the poor as occupiers of the land in question, within the meaning of 43 *Eliz.* c. 2.

UPON an appeal against a poor rate for the hamlet of *Ballingdon*, in the county of *Essex*, it being objected by the defendants that they were rated for property which they did not occupy, the Sessions confirmed the rate, subject to the opinion of this Court upon the following case:—

Richard de Clare, Earl of *Gloucester*, about the year 1250 granted certain pasture land called *Portman's* Croft, in the

1823.

The King v. The Borough of Sudbury.

hamlet of *Ballingdon*, to "his burgesses and whole commonalty of *Sudbury*;" and *Charles* the Second, by his charter, under which the corporation exists, confirmed the said grant to the mayor, aldermen, and burgesses. This land is inclosed, and the corporation, which consists of a mayor, six aldermen, and twenty-four capital burgesses, appoint, and have always, within the time of living memory, appointed a person, who is called "the ranger of the commons," to keep the keys of the gates, clean the ditches, preserve the fences, impound cattle trespassing, and do other acts of a similar description. They have, during all that time at a court, called a Court of Orders and Decrees, annually made such regulations concerning the commons as they thought proper, and given a public notice of them by the common crier; and for the year when the rate in question was imposed, the order declared that every burgess who had a right to turn his cattle to feed on the common, should put on two head of cattle, and no more, on *Portman*'s Croft. It then proceeded to appoint the day when the cattle should be turned on, and to fix the price for each head of cattle, which price is always paid by the freemen exercising this right (who amounted in the year in question to more than one hundred) to the treasurer of the corporation. The mayor, aldermen, and capital burgesses being resident, enjoy the same right upon the same terms, and some of them also exercised it during the year in which the rate was made. The cattle are branded, when turned on, by the ranger. The whole of the money thus paid to the treasurer, after deducting the expences incident to the management of the land, is distributed among the poorer burgesses who have a right of depasturing cattle, but do not exercise it on account of their poverty. The mayor, aldermen, and capital burgesses, were rated in their corporate capacity as the occupiers of *Portman's* Croft. The questions for the opinion of the Court are, whether there was a rateable occupation of *Portman's* Croft; and if there was, whether the corporation, or

the individuals who depastured their cattle upon it, were liable to be rated.

Walford (with whom was *Brodrick*), in support of the order of Sessions, contended, that the rate was well made upon the present defendants, and that they were occupiers of *Portman's* Croft within the meaning of the word, as used in the stat. 43 *Eliz.* c. 2. He relied upon *Rex* v. *Tewkesbury* (*a*), as a case not distinguishable from the present, and consequently that the select body of the corporation of *Sudbury* were to be considered as trustees for the benefit of the whole, and were therefore rateable in this instance.

He was stopped by the Court; and

Knox was called upon to support the rule for quashing the order of Sessions. It is not contended that a corporation may not be rated, *Rex* v. *Gardner* (*b*); nor will any question arise in this case upon the rateability of rights of common, *Rex* v. *Dersingham* (*c*); the land upon which the rate is imposed being the soil and freehold of the corporation, though inclosed pasture. The point to be decided is, whether there was a beneficial occupation by the corporation as a body, or by particular individuals only, who were members of the corporation. In the first case, it is admitted, that the rate is properly imposed; but, in the second, it cannot be supported. *The King* v. *Watson* (*d*) appears to have settled the question. There, certain lands belonging to the corporation of *Huntingdon* were depastured by such of the corporators as chose it, according to a stint annually fixed by the mayor, for which they paid a regulated price, which was divided among those members of the corporation who did not stock. The Court were unanimously of opinion that those individuals should be rated, and not the

(*a*) 13 East, 155.
(*b*) Cowp. 79.
(*c*) 7 T. R. 671.
(*d*) 5 T. R. 480.

1823. The King v. The Borough of Sudbury.

corporation, because the actual beneficial occupation was in them, for which they paid a pecuniary compensation. *The King* v. *Tewkesbury* (a) has been pressed strongly on the other side, but the facts are different; and the case of *Rex* v. *Watson* is not only recognized in it, but the decision is distinctly sustained. In the *Tewkesbury* case, the trustees were nothing more than agisters of cattle; they took in the cattle of strangers at a certain sum per head, which is a very common mode of occupying pasture land. They were, therefore, properly rated, and not the owners of the cattle. But here the corporation of *Sudbury* can, in no sense, be said to be agisters; a portion of its members occupy their own land, paying, as in the *Huntingdon* case, a consideration to those who do not stock. The appointment of the ranger by the corporation cannot affect the occupation; the services performed by him yield no benefit to the corporation as a body; that arises from the land, though the individuals who stock it derive advantage in the increase and preservation of the herbage from his superintendance of the pastures. It is very common to permit officers of corporations to occupy portions of the corporation property for corporation purposes; but it has been always holden, that such officers have been rateable to the full amount of their actual beneficial occupation, and not the corporations, and these decisions have never been questioned. The doctrine of an implied occupation has hitherto never been admitted. The argument, ab inconveniente (from the large number of occupiers) was urged in *Rex* v. *Watson*; for there were eighty persons entitled to stock. It would certainly be more desirable, in many instances, to rate the landlord; but the statute makes such only liable, as are also occupiers. The number of occupiers, therefore, however large, cannot change the liability. It is in respect of occupation only that a landlord can be rated. But it is said the test of occupation is the right of maintaining trespass. This point was adverted to

(a) 13 East, 155.

in *Rex* v. *Watson*, and an opinion expressed by *Lawrence*, J., that the corporation could not bring that action, but that the individuals might, who were in the actual and exclusive enjoyment of the pasture under the stint. For these reasons the order of Sessions must be quashed.

BAYLEY, J.—The case of *Rex* v. *Watson* differs from the present in two particulars, first, it was considered in that case, that the individual who turned on, had the exclusive occupation and enjoyment, independently of any right whatever in the corporation; and, in the second, nothing was paid to the corporation by those who stocked, they made a payment, but not to the body at large, it was merely to those burgesses who had a right to stock, but did not exercise it. In these particulars, therefore, this case is distinguishable from *Rex* v. *Watson*. I think it extremely probable, from my own local knowledge on the subject, that by the words *meted out*, used in that case, was meant that each party had originally a certain portion of the common specifically assigned for his exclusive enjoyment; but I do not rely upon that circumstance, because I do not collect it from any thing stated in that case. The *Tewkesbury* case is in some respects distinguishable from this, inasmuch as here the cattle by which the common is fed, belonged to members of the corporation, but in the *Tewkesbury* case they belonged to strangers. The principle upon which the *Tewkesbury* case was decided was, that the trustees were properly rated, because they did not let out any definite portion of land, and did nothing more in substance than take in the cattle to agist. In this respect, I think that an authority for the present case, because here no definite portion of land is let to any individual. The corporation do nothing more than take the cattle in to agist, at so much per head, annually, and the money, when collected, is paid to their treasurer. But this case differs from *Rex* v. *Watson*, in two important particulars, first, beyond all question the corporation possess an

1823.

The King v. The Borough of Sudbury.

exclusive right of ownership, to a certain degree, over the common in question; and, secondly, they are the hands to receive all the money paid for the cattle agisted. The case states also this important fact, that there is a ranger of the common. By whom is he appointed? By the corporation at large; and by whom is he paid? why, by the corporation at large, out of the fund received by the treasurer, and that fund is supplied by those who agist their cattle, which money becomes the fund of the corporation at large. What is the duty of the ranger? he is to keep the keys of the gates, clean the ditches, repair the fences, and impound cattle trespassing, which are acts usually done by the occupier of land. Would all the commoners have a right to say, "we insist upon having the keys of the gates; we are the only persons entitled to occupy the land?" If the occupation was theirs, and not that of the corporation at large, they would have a right to hold that language to him; they would have a right to say, "you are our servant, and we will see whether we shall retain you or not." It appears that the corporation had, for the year when the rate in question was imposed, made an order, that every burgess who had a right to turn his cattle to feed on the common, should put on two heads of cattle, and no more. Then the number of cattle to be turned on, would depend, not upon the will of the corporation, but on the choice of the different persons having a right of common. They would have a right to determine whether they would take a compensation in money, or turn their cattle on, and the amount of the compensation would depend upon the number of cattle which would be agisted. No man could predicate at the beginning of the year, what the portion of common would be, which each burgess would enjoy, because the burgesses have an option whether they choose to turn cattle on or not. For instance, the commoners for half a year, might be sixty, and for the remainder of the year, they might be eighty, so that the amount of the annual profit would be uncertain. For one part of

the year the burgess would have a sixtieth part of the profits, and for the other half he would have only the eightieth part. His proportion, therefore, would be varying from time to time. Why are not the corporation to be treated as the occupiers? They have the money which is paid in respect of the agistment, and out of that money, they have the complete power of paying the rate which is payable in respect of the property. For these reasons it appears to me, that this case is distinguishable from *Rex* v. *Watson*, and that it falls much more within the principle of *Rex* v. *Tewkesbury*, which certainly affords a much more reasonable rule of construction than the first-mentioned case.

HOLROYD, J.—I am of opinion that this case comes within the principle of *Rex* v. *Tewkesbury*, and is distinguishable from *Rex* v. *Watson*. Several circumstances are found which did not appear in *Rex* v. *Watson*; for in the latter case, there was no proof that the corporation had any control or power over the land, or had a right to do any acts as occupiers of the land; but, in the present case, the right of soil is in the corporation. They appoint a ranger for the management of the land. He is to do certain acts necessary to keep it in order; he is to keep the keys of the gates, to cleanse the ditches, preserve the fences, and impound cattle trespassing; he is appointed by the corporation for all these purposes, as well as to do other acts of a similar description, and regulations are annually made by the corporation, with respect to the mode of enjoyment of the right of common by the freemen. The right is of a limited description, inasmuch as those who have the right, are only to exercise it according to the extent of the commons. These regulations limit the number of stints, and appoint the time when the cattle are to be turned on, and fix the price for each; and the sums of money so received are distributed by the corporation among the poorer burgesses. All these acts are done by the corporation in virtue of their possession of the

land. Although these rights of common are exercised by such persons as choose to stock, paying a certain sum of money, still they are only to stock according to the limit allowed by the corporation, who, upon receiving the money, employ it for the benefit of the poorer burgesses, who derive no benefit from the common. The right of action, therefore, as far as doing any act upon this common by a stranger, would be an action of trespass by the corporation, in whose possession the land, in my opinion, lawfully is. If the burgesses have any right of action against any persons who disturb or infringe their common right, it would be an action on the case by them, and not trespass. How does this principle stand with respect to the case of *Rex* v. *Watson*? There the burgesses were tenants in common of the property which had been rated. In that case no action of trespass would lie at the suit of the corporation, the possession being in point of law in the burgesses, to whom the land was meted out. There is a great difference between the case where the whole possession of the land is yielded up for the purpose of beneficial enjoyment, and that where a subordinate right is allowed to be exercised, as in the present case, in which the right of common is the right of the burgesses. If in this case the money paid by the burgesses was to be considered as a payment of rent in the character of tenants, they would be the persons to be rated; but I do not think this is to be considered as a letting of the common by the corporate body. The money payment is not for rent, but a receipt of money for the agistment of the cattle, the corporation retaining the right of possession and the actual possession, subject to the rights of pasture allowed to be exercised as a common right by such of the burgesses as choose to send their cattle on, and subject to a payment of a certain price, afterwards to be distributed among the poorer burgesses. For these reasons I think the defendants were rateable.

Best, J.—I think this case is very distinguishable from *Rex* v. *Watson*, for the reasons stated by my learned Brothers, and ranges itself within that of *Rex* v. *Tewkesbury*. The latter is much more consistent with reason and sound sense, and, if it became necessary, I should rather be disposed to overturn the former, and support the latter. This is a very plain case. If *A.* is the occupier of land for the benefit of *B.*, *C.*, and *D.*, who is to be rated? Undoubtedly *A.*, and not *B.*, *C.*, and *D.*, who have no connexion with the land. They receive by the hands of *A.* the benefit of the pasture, but they have no connexion with the land, nor are they in any way to be considered as the occupiers; consequently *A.* must be the person rated. The corporation here, are not only the owners of the land, which it is admitted they are, but they are the occupiers of it for the benefit of the different members of the corporation, namely, first, those who are possessed of cattle and turn on; and, second, those who are too poor to be possessed of cattle, but amongst whom the money received from the agisters is afterwards divided. That shews that the corporation are occupiers of the land. This is nothing like a tenancy in common. Tenants in common have an equal interest in the soil. Here there is not one of the freemen who has an interest in the soil. The sole interest in the soil is in the corporation, and that distinguishes the case from a tenancy in common. The case expressly finds that the corporation are owners of the soil. They appoint a person called a ranger to keep the gates, cleanse the ditches, and prevent cattle from trespassing; so that the possession must be considered as in them, and not in the burgesses. The right to impound cattle trespassing, could not be exercised if they had not the complete possession. That circumstance, I think, is quite decisive. But the case does not stop there. The corporation have a Court of Orders and Decrees, at which they make regulations concerning the number of cattle to be turned on by the burgesses, and for this purpose pub-

1823.

The King v. The Borough of Sudbury.

lic notice is given by the crier with a view to ascertain what number of persons intend to send cattle on. It must be decided by the corporation how many cattle the burgesses have a right to depasture, and that must depend upon the number of poor persons who have no cattle. All this shews that the right of occupation is entirely and exclusively in the corporation; for if they have not that right of occupation, how comes it that this sort of jurisdiction is exercised? When the cattle are turned on, they are precisely in the same situation as the cattle of any other person, agisted on any other land, and it is impossible to distinguish this case from the ordinary case, where the owner of pasture-land agists the cattle of other persons who choose to depasture their stock at so much per head. This, certainly, is a very important case as it respects this borough. It is not, however, a question of convenience or inconvenience, but a question of rateability. How is it possible to rate any other person but the corporation? It is impossible to ascertain the amount of interest which each person who agists his cattle, has in the land; besides which, it cannot beforehand be ascertained who will have an interest, it being matter of uncertainty what persons will depasture their cattle each year. If the corporation be not rated, the land must go unrated, for it is impossible to rate any other persons. For these reasons I am of opinion, that though the corporation do not actually occupy the land, yet, as it is in their possession, they must be considered as the occupiers, and therefore rateable.

Order of Sessions affirmed.

RICHLEY *v.* PROONE.

To a declaration for use and occupation, the defendant pleaded "that after the making of the promises, and after the accruing of the causes of action mentioned in the declaration, and before the exhibiting of plaintiff's bill, defendant delivered to plaintiff one ton weight of *Riga* hemp, and one hundred weight of *Russia* tallow, of the value of 30*l.* in full satisfaction and discharge, and that plaintiff had accepted the same of defendant in full satisfaction and discharge, &c.": On affidavit that this plea was in every respect false, the Court allowed plaintiff to sign judgment as for want of a plea.

PLATT had obtained a rule nisi for the plaintiff to sign judgment as for want of a plea, on an affidavit stating that the plea was altogether false, and pleaded for delay. The declaration was for use and occupation. The plea stated "that after the making of the promises, and after the accruing of the causes of action in the declaration mentioned, and before the exhibiting of the plaintiff's bill, the defendant delivered to the plaintiff one ton weight of *Riga* hemp, and one hundred weight of *Russia* tallow, of the value of 30*l.* in full satisfaction and discharge," &c. and "that the plaintiff accepted the same of the defendant in full satisfaction and discharge," &c.; concluding with a verification.

E. Lawes now shewed cause against the rule, contending, that as this was an usual and ordinary plea, well known in practice, and not tending to put the plaintiff to expence by rendering it necessary for him to consult counsel, it was within the rule recently laid down by the Court on the subject of sham pleas, which was, that a party might be allowed to use a plea for the purpose of delay, if it was not so ingeniously and unusually framed as to put the opposite party to expence. *Shadbolt* v. *Berthoud* (a), and *Corbett* v. *Powell* (b). This was a plea upon which the plaintiff might take issue or demur. The Court could not, upon affidavit, try the truth or falsehood of this description of plea, nor could they assume that it was false. It would be an extremely dangerous rule to lay down, that a defendant was bound to verify his plea upon affidavit, and that if he did not, the plaintiff was entitled to sign judgment; because it would tend to break in upon the general principles of jus-

(a) Ante, vol. i. 446. (b) Id. 448.

1823.



RICHLEY v. PROONE.

tice. The jury only were the competent tribunal to determine the truth or falsehood of the plea.

Platt, contrà, was stopped.

The Court, without delivering any opinion as to the rule of practice, determined that the rule must be made absolute; but intimated, as the ground of their decision, that as it did not appear that the attorney had any authority from his client to plead such a plea, the latter ought not to have the benefit of the delay which such a mode of pleading occasioned. The defendant himself did not venture to state that he had given his attorney instructions to plead this plea, and therefore he ought not to be allowed to avail himself of what had been done without his authority.

Rule absolute (*a*).

(*a*) See *Thomas* v. *Vandermoolen*, 2 B. & A. 197. *Barclay* v. *Godslake*, Ib. 199. *Glynn* v. *Thorpe*, 1 B. & A. 153. *M'Leish* v. *Welch*, ante, vol. i. 447. *Gaitskill* v. *Greathead*, Ib. 359. 4 & 5 Ann. c. 16. s. 11. 3 Burr. 1618; and *Pierce* v. *Blake*, 2 Salk. 515, where *Holt*, C. J., said, that where the officers or the attornies of the Court misconduct themselves, or put any deceit upon the Court, or upon the suitors, the Court has the power of punishing them.

ROSS, Administrator, &c. *v.* PARKER.

Declaration in covenant for the assignment of a share in certain *stock*, professed to set out the covenant, and described it as a covenant to assign a certain *sum of* 2000*l*. Defendant, on oyer craved, set out the deed, and demurred as for a variance, that the covenant was to assign *stock*, not *money*:—Held, no variance; and, second, if it was, the defendant should have pleaded non est factum, and not have demurred.

COVENANT by plaintiff as administrator de bonis non of *W. Enticknap*, deceased, left unadministered by *T. Ruffin* and *W. Norman*, executors, deceased, upon a deed of assignment of a share in certain stock. The declaration set

out the covenants contained in the deed, dated 2d *May*, 1805, by which it was witnessed, that for the consideration therein mentioned, defendant and *Ann* his wife, did bargain, &c. to *Enticknap*, his executors, &c. all the part and share of the said *Ann*, of, to, in, or out of *a certain sum of* 2000*l.* therein described, subject as therein mentioned, To hold, &c. as and for his and their own proper *monies* and effects, upon trusts, &c. out of the money which he or they should receive under the said indenture, to retain unto himself, &c. so much money as would be sufficient to re-purchase 200*l.* three per cent. bank annuities, and all interest and dividends which should be due in respect thereof until the same should be re-purchased:—Covenant by defendant and *Ann* his wife, on or before 1st *June*, 1807, to re-purchase 50*l.*, part of the said 200*l.* bank annuities, and transfer the same into the name of *Enticknap*. Similar covenants as to three other sums of 50*l.* to be transferred on 1st *December*, 1807, 1st of *June*, 1808, and 1st *December*, 1808, respectively. Breach, that defendant and *Ann* his wife did not re-purchase or transfer, &c. in the terms of the covenant, but not alleging that defendant did not "retain, &c. so much money as would be sufficient to re-purchase" the 200*l.* stock. The defendant craved oyer of the deed, and after setting it out demurred to the declaration, and assigned for causes, first, that although it was peculiarly in plaintiff's knowledge, and although the administration granted to him was void without it, it is not stated which of *Enticknap*'s executors survived, or that the survivor died intestate. Second, that the indenture, as stated in the declaration, purports to be an absolute assignment of 200*l.* *in money*, but upon oyer of the deed, it appears that the property had been previously assigned to other parties, and that it was *stock*, not *money*. Third, that the covenant being to replace stock, it should have been stated that stock had been sold out, and was to be re-placed; and, fourth, that it does not appear that defendant has not retained sufficient to re-purchase the 200*l.* stock, with the

1823.
Ross
v.
Parker.

interest and dividends, out of the balance of *Ann Parker's* share of the 2000*l*. stock. Joinder in demurrer.

E. Lawes, in support of the demurrer, abandoned all the objections, except the second, namely, that the deed, as set out in the declaration, purported to be an *absolute* and *legal* assignment of money, whereas it appeared upon oyer to be an assignment of *stock*, and of an *equitable* interest therein only; and upon that he relied as a fatal variance between the deed and the record. He contended, that as the object of setting out the instrument was to shew the real meaning and effect of it, this declaration was bad, because it in effect misrepresented the deed, and was calculated rather to mislead than to inform; and he insisted, that the proper mode of raising such an objection, was by demurrer, and not by plea of non est factum. He cited *Holman* v. *Burrow* (a), *Smith* v. *Homans* (b), *Jordan* v. *Fawcett* (c), *Sands* v. *Ledger* (d), *Nightingale* v. *Devisme* (e), *Comyn's Digest* (f), *Jones* v. *Brinley* (g), *Swallow* v. *Beaumont* (h), and *Vansandau* v. *Burt* (i), in support of both branches of his argument.

Tindal, contra, was stopt by the Court.

Per Curiam.—This is not a fatal variance, nor is it such an objection as can be raised upon demurrer. With respect to the supposed variance, none of the cases cited are in point, because in all those instances, the variance was in a substantive and material part of the instrument, but here it is perfectly immaterial. The declaration contains the covenant upon which the action is brought, and that is all that is necessary to support it, the recital of the other parts being

(a) 2 Ld. Raym. 791.
(b) 1 Saund. 316.
(c) 1 Mod. 50. 1 Sid. 449.
(d) 2 Ld. Raym. 792.
(e) 5 Burr. 2589.
(f) Tit. Pleader, c. 47.
(g) 1 East, 1.
(h) 2 B. & A. 765.
(i) 5 Ibid. 42.

perfectly superfluous, and having no bearing at all upon the question between the parties. But even if this were a variance, still it could not properly be taken advantage of on demurrer. The defendant should have pleaded non est factum, and put the validity of the deed in issue.

Judgment for the plaintiff on demurrer.

SPENCER and Another, Assignees of FILDES v. MARRIOTT, Executor of SARAH MARRIOTT, deceased.

The Governors of the *Foundling Hospital* grant a lease for years of a certain dwelling to *L.* and covenant that the demised premises, or any part thereof, shall not be converted into a shop or other place for carrying on any trade or public shew of business during the term, without the consent in writing of the lessors. *L.* assigns the lease to *M.*, who, by an under-lease, demises the premises to *F.* with a covenant for quiet enjoyment, "to hold the same, without any lawful let, suit, trouble, molestation, eviction, interruption, claim, or demand whatsoever, by or from her, her heirs, executors, administrators, or assigns, or any person or persons whomsoever, claiming, or to claim, by, from, under, or in trust for her, them, or any of them, or by or through her or their *acts, means*, right, title, forfeiture, privity, or *procurement*." In this lease the covenant against converting the premises into a shop, &c. is omitted. *F.* assigns the lease to *S.*, who under-lets to *W.*, and he converts part of the premises into a shop, without the consent of the original lessors, who bring ejectment and evict him for a forfeiture. *M.* having died, *S.* declared against her executor for a breach of the covenant for quiet enjoyment, averring, that by her *act*, and through her *means* and *procurement* in making the under-lease to *F.*, without any covenant similar to that in the original lease to *L.*, he was hindered from quietly enjoying, &c. :—Held, on demurrer, that the action would not lie.

COVENANT by the plaintiffs, assignees of the grantee of a lease of certain premises situate in *Guildford Street*, in the county of *Middlesex*, against the defendant, executor of the grantor, deceased. The declaration set out a lease dated 4th *June*, 1814, by the deceased to *John Fildes*, containing the usual covenants on the part of the lessee, and the following on the part of the lessor:—"that on payment of rent and performance of covenants, the said *J. F.* should peaceably and quietly have and hold, &c. without any lawful let, suit, trouble, molestation, eviction, interruption, claim, or demand, whatsoever, by or from the said lessor, her executors, administrators, or assigns, or any person or

1823.

SPENCER v. MARRIOTT.

persons whomsoever claiming, or to claim by, from, under, or in trust for her, them, or any of them, or by or through her or their acts, means, right, title, forfeiture, privity, or procurement." It then stated that *J. F.* entered upon the premises under this lease, and afterwards on the 8th *June*, 1815, assigned over all his interest therein, together with the said lease, and all benefit and advantage thereof to the plaintiffs, and averred performance by them of all covenants, &c.; breach, first, that the plaintiffs did not quietly enjoy, &c. but, on the contrary, that the deceased had held the premises as the assignee of a term granted by the Governors of the *Foundling Hospital*, to one *H. J. Layton*, in which demise a covenant was inserted, that the said *H. J. L.* should not convert, use, or occupy, nor suffer to be converted, used, or occupied, the said demised premises, or any part thereof, into or for any shop, warehouse, or other place for carrying on any trade, nor suffer any open or public shew of business therein, without the previous consent in writing of the said lessors, their successors or assigns, or any of their under-tenants;" with a proviso, "that in case of breach or non-performance thereof, the said lessors" should re-enter and re-possess the premises; and that the deceased made the lease to *J. F.* without any covenant similar to the covenant in the lease to *H. J. L.* without any restriction as to converting the premises into a shop, and without any notice to him of such restriction; that the plaintiffs being wholly ignorant of the said covenant and restriction on 24th *June*, 1814, during the said term to them granted, demised the said premises to one *Thomas Walker*, without any such covenant or restriction;—that the said *T. W.* afterwards entered the said premises, and converted part thereof into a shop or place for carrying on the business of an auctioneer, without the consent of the original lessors;—whereby the said lease granted to the plaintiffs became and was void and forfeited, and the original lessors brought an action of ejectment against them, and

1823.

SPENCER
v.
MARRIOTT.

recovered judgment against them therein;—concluding, "that by the *act* of the said *Sarah* (the deceased), to wit, by her act in making the said lease and granting the said term therein contained to the said *J. F.* without the same containing any covenant similar to the said covenant so contained in the said lease to the said *H. J. L.* and so assigned to her, the plaintiffs were hindered from quietly enjoying, &c. and were evicted, &c. and suffered loss of their monies." Second breach was similar to the first, concluding with an averment, "that by *means* of the said *Sarah*, to wit, by *means* of her neglecting and omitting to insert, or causing to be inserted in the lease to *J. F.* the covenant before-mentioned, plaintiffs were hindered from quietly enjoying, &c." and the third breach was more general. Demurrer to the declaration, and joinder in demurrer.

F. Pollock, in support of the demurrer, was stopped by the Court, who desired to hear

Amos, contrà.—The question for the decision of the Court depends upon the construction which is to be given to the covenant for quiet enjoyment, which is to be construed, according to the established rule of law, most strongly and favorably for the covenantee (*a*). It is clear, that the plaintiffs were not by law entitled to call upon their lessor to produce her title (*b*), and therefore the only protection they had was the covenant for quiet enjoyment, and they ought to receive all the benefit that a strict construction of that covenant can afford them. Then how is this covenant to be construed? It cannot, perhaps, be contended, that the lessor has herself committed any positive "act" in breach of her covenant; but if she has been guilty of default, it is enough; *Howes* v. *Brushfield* (*c*); and that she clearly has been, in withholding the knowledge of the re-

(*a*) Shep. Touch. 162.
(*b*) Sugden's V. & P. 283. 2 Taunt. 433.
(*c*) 3 East, 490.

1823.

SPENCER v. MARRIOTT.

strictive covenant in the original lease. Neither, perhaps, can it be said that the plaintiffs have been evicted by the "procurement" of the lessor, because that term seems necessarily to imply some positive and personal "act." But the remaining word "means" in the covenant is one of much greater latitude than the two former, and a distinction was expressly taken between that word and the word "procurement" in a case very much in point upon this subject. *Butler* v. *Swinnerton* (a). Surely it was "by her means" that the eviction of the plaintiffs took place, because she had the power of communicating the fact which would have prevented the conversion of the premises, and all the consequences of that act, but which she did not communicate, although peculiarly within her own knowledge. Upon the general rules of construction, therefore, and upon the distinction alluded to, supported by authorities, the lessor has been guilty of a breach of her covenant, and the plaintiffs are entitled to maintain this action, to recover a compensation for the injury they have sustained "by and through her means."

BAYLEY, J.—If there had been no covenant at all in the lease granted by Mrs. *Marriott* to the plaintiffs, respecting the mode in which the demised premises were to be used, I should still very much doubt whether they had any right to convert a dwelling-house into a shop, without special permission for that purpose. It is not, however, necessary to decide that point now, for the only question before the Court is, whether the covenant for quiet enjoyment has been broken *by the act or through the means of the lessor*. If there was any blameable suppression of truth on the part of Mrs. *Marriott*, when she granted the lease to the plaintiffs; if she concealed from them facts and circumstances connected with the premises, which it was important for their interest that they should know; undoubtedly

(a) Cro. Jac. 657.

1823.



SPENCER
v.
MARRIOTT.

an action on the case might have been maintained against her for any damage sustained in consequence of such concealment. But this is an action for a breach of covenant, and the single question is, whether that covenant has been broken. It is not pretended that any "let or interruption" has been interposed by the lessor or her representatives to the plaintiff's quiet enjoyment. The allegation is, that their enjoyment has been disturbed "by and through *her* acts, means, and procurement," and as it was impossible to contend that the injury was occasioned by any personal *act* of the lessor, it has been attempted to distinguish between these terms, and to argue that it was occasioned through her *means* or *procurement*. I cannot adopt this distinction. It seems to me that these three words are synonymous, and that each of them, in the situation in which they stand, and considering the object of the parties in using them means some personal act of interference by the lessor, emanating from, and referrible to, herself. In this view of the case it cannot be said that the injury of which the plaintiffs complain, was occasioned by the lessor; the source of the injury was the conversion of the dwelling-house into a shop, and that conversion was the act, not of Mrs. *Marriott*, but of the party in possession. For these reasons I am of opinion, that this declaration cannot be supported, and that our judgment must be given for the defendant on the demurrer.

HOLROYD, J. and BEST, J. concurred.

Judgment for the defendant (*a*).

(*a*) Vide *Dudley* v. *Folliott*, 3 T. R. 584, and the cases there cited.

1823.



Vyvyan v. Arthur, Administratrix of N. D. Arthur, deceased.

A testator being seised in fee of certain lands, and also of a corn mill, demised the former to a tenant for three lives, covenanting for a money rent, and, in addition thereto, that the lessee should perform certain suits and services, and, amongst others, that he, *his heirs and assigns*, should do suit to the lessor's mill by grinding there all such corn as grew upon the demised land. The testator afterwards devised the mill and also the reversion of the land to *the same person*, who became seised upon the death of devisor. During the demise of the land, the lessee died, intestate, and his wife took out administration of his estate and effects. Covenant being brought, assigning for a breach neglect to grind corn at the mill, during the life-time of the lessee and also since his death:—Held, that the reservation of the suit to the mill was in the nature of a rent, and that the covenant to render it ran with the land, whilst the ownership of the land and the mill remained in the *same person*, and entitled the latter to maintain an action at common law upon it against the personal representative of the lessee,

COVENANT by the plaintiff, as devisee under the will of *Thomas Vyvyan*, deceased, against the defendant, as administratrix of *Nicholas Donithorne Arthur*, also deceased, intestate, for a breach of covenant in the non-performance of certain suit and service at the mill of the plaintiff. The declaration stated that the plaintiff's testator being seised in fee of the demised tenements and the appurtenances, and also of a certain mill, on the 14th *June*, in the year 1779, by indenture demised a close of land, together with certain common of pasture in the indenture described, to the defendant's intestate, *his executors, administrators, and assigns*, for a term of ninety-nine years, if three persons therein mentioned should so long live; "yielding and paying therefore unto the said *Thomas, his heirs and assigns*, certain rents, sums of money, payments, and returns, &c.; *and also doing certain suits and services to the mill of the said* Thomas, *his heirs and assigns, commonly called* Tregamere *mill, by grinding all such corn there as should grow in and upon the said close.*" It then averred that the intestate entered upon the close, and that the reversion thereof belonged to the testator, who by his will afterwards devised the same and the said mill unto three persons in the will mentioned, their heirs and assigns, to the use of the plaintiff for life, and died without altering his will, whereby the plaintiff became seised of the reversion of the close and of the mill in

fee for life. It then stated, that during the continuance of the term the intestate died, and the defendant administered to his effects, and that one of the persons for whose life the lease was granted was still living. Breach, that after plaintiff became seised of the reversion of the demised premises, and of the mill, and, during the life-time of the lessee, corn grew upon the demised premises which ought to have been ground at the mill, and that although the mill has been always in a fit condition to grind corn, "yet the intestate in his life-time, and the defendant since his death, did not nor would do suit to the mill of the plaintiff by grinding there, the corn so grown upon the demised premises, but wholly neglected so to do." General demurrer to the declaration and joinder in demurrer.

F. Pollock, in support of the demurrer. The question in this case is, whether the covenant to grind at the mill of the lessor, the corn which grew on the land demised to the lessee, is to be considered as a collateral covenant merely, or as a covenant running with the land. If it be collateral only, it is quite clear that the plaintiff, being assignee of the lessor, cannot sue upon it. In the recent case of *Vernon* v. *Smith* (a), in which all the previous decisions upon this subject were elaborately reviewed, a rule was laid down by which the distinction between a collateral covenant, and a covenant running with the land, is to be ascertained; which is this,—if the covenant be such as extends to, or affects the thing demised, it is one which runs with the land and binds the assignee; otherwise it is collateral, and does not bind him. The cases there examined, which seem more particularly to bear upon the present, are, *Spencer's* case (b) and *Bally* v. *Wells* (c), in both of which the covenant was in conformity with the rule alluded to, and extended to the thing demised. But in this respect the covenant now under consideration is deficient; for the produce

(a) 5 B. & A. 1. (b) 5 Rep. 16. (c) 3 Wils. 25.

1823.

VYVYAN v. ARTHUR.

is not the thing demised, and the covenant is only to grind the produce at the mill, and cannot therefore be said to extend to the land itself, which is the thing demised; and therefore *The Mayor of Congleton* v. *Pattison* (a) is precisely in point, where it was held, that a covenant by the lessee, for himself and his assigns, not to employ in the mill persons settled in other parishes, did not run with the land. There is also an old case mentioned in *Viner's Abridgment* (b); "if an abbot covenants, and hath used time out of mind to sing in the manor of *B.* for him and his servants, his heirs shall have advantage of this covenant." But that *also* falls within the distinction already alluded to; because there the covenant was to do something essentially connected with the land, and with the particular occupation and use of it; here it regards only the mode, not in which the land shall be used or occupied, but in which the produce shall be applied. It is not easy to find authorities directly affirmative of the position now contended for; but it has at least been alluded to as a questionable point, *Hartley* v. *Pehall* (c), and the distinguishing character of this particular covenant seems to go far to take it out of the other cases already cited. [*Bayley*, J. Is there any case *which decides that a covenant to build a house upon other land than that demised, belonging to the covenantee, would not enure to his benefit? and if not, suppose in such a case the land devised to *A. B.*, such a covenant being still in existence, could not *A. B.* sue upon that covenant as the assignee of the covenantee?] It should seem not, and there is an old authority against such a proposition. In *Purfrey's* case in this Court, *Hilary* Term, 29 *Eliz.* (d), where "one possessed of a term of six years in a tavern, leased the same to another for three years, with a covenant that the lessee should account with the lessor monthly for the wine he

(a) 10 East, 130.

(b) Tit. *Covenant*, H. 3. fol. 390. stated in *Spencer's* case, 5 Rep. 17. from the Year Book of 42 Edward 3. 3.

(c) Peake's N. P. C. 151.

(d) Moore, 243. Godb. 120.

1823.

VYVYAN
v.
ARTHUR.

sold, and afterwards the lessor granted the three remaining years of the six to a third person, and he called upon the lessee to account, and he would not; whereupon he brought covenant, and defendant pleaded that he had accounted to the assignee of the three years, and upon that demurrer; the Court held it was no plea, *because it was not a covenant which did go with the land or the reversion, but was a collateral thing, and did not pass by the assignment of the three years.*" The same case is also mentioned in *Viner's Abridgment* (a), and seems to bear strongly upon the present question. [*Best*, J. That was a covenant for the goodwill of the tavern merely, and as such was in no degree co-extensive with the land; that makes it perfectly distinguishable from the covenant here.] It was a covenanted mode of ascertaining the rent which was to be paid, and in that respect seems very analogous to the covenant here. Upon these grounds, therefore, it is submitted that this was a mere collateral covenant which did not run with the land; and therefore the present plaintiff is not in a condition to maintain any action for the breach.

Gaselee, contrà. This is clearly a covenant which runs with the land, the benefit of which passes with the reversion, and upon which therefore the assignee of the lessor is entitled to sue. The service at the mill is certainly not in express terms denominated a "rent;" but it is an important constituent part of the reddendum, and is in fact a part of the rent to be paid. It is an act which the lessee covenants to do for the benefit of the lessor, in consideration of his occupation of the land; and it is therefore strictly and intimately connected with and extending to the land, the thing demised; and indeed more so than mere money can be; because here the reddendum is to grind at the mill the corn grown upon the land demised; so that the rent here arises immediately out of the land, which a money

(a) Tit. *Covenant*, K. 15. fol. 393.

1823.
VYVYAN v. ARTHUR.

rent would not necessarily do. Properly speaking, it is a corn rent; and where has it ever been held that a covenant to pay a corn rent did not run with the land? This very argument is powerfully illustrated in *Spencer's* case (*a*), where a case from the *Year Books* of the 42 *Edw.* 3. 3. is thus stated:—"Grandfather, father and two sons; the grandfather was seised of the manor of *D.*, whereof a chapel was parcel; a prior, with the assent of his convent, by deed, covenanted for him and his successors, with the grandfather and his heirs, that he and his convent would sing all the week in his chapel, parcel of the said manor, for the lords of the said manor and his servants, &c. The grandfather did enfeoff one of the manor in fee, who gave it the younger son and his wife in tail, and it was adjudged that the tenants in tail as terre-tenants (for the elder brother was heir) should have an action of covenant against the prior; for the covenant is to do a thing which is annexed to the chapel, which is within the manor, and so annexed to the manor as it is there said; but if such covenant were made to say divine service in the chapel of another, there the assignee shall not have an action of covenant; *for the covenant in such case cannot be annexed to the chapel, because the chapel does not belong to the covenantee*, as is adjudged in 2 *Hen.* 4. 6. b." The case there put is expressly in point with the present. Suppose the covenant had been to render annually a bushel of corn for every acre of land demised; that would unquestionably have been a covenant running with the land; and non constat in this case how the grinding is to be paid for by the lessee, whether in money or by a portion of the corn itself; and the latter mode which is the most probable would bring this case entirely within the principle of the case cited. The only case apparently at variance with the present argument is *The Mayor of Congleton* v. *Pattison*, but the very reasons given

(*a*) 5 Rep. 18.

in the judgment there for the distinction which is taken, shew the strength of the principle now contended for.

1823.

VYVYAN v. ARTHUR.

The Court stopped him, and proceeded to give judgment.

BAYLEY, J.—I think the present case is not in substance distinguishable from the case cited from the *Year Books* of the 42 *Edw.* 3. 3. Here the plaintiff is the assignee of the lessor, and the defendant is the personal representative of the lessee, and I am satisfied upon the authorities cited, that this is a covenant running with the land, and that the plaintiff, as the assignee of the lessor, is entitled to maintain this action at common law. There are cases in which an assignee of the reversion may maintain an action at common law; and there are others in which he is entitled to bring it under the statute 32 *Hen.* 8. This being a covenant at law, I think the plaintiff may maintain the action at common law without availing himself of the statute. The reddendum here, is one of a somewhat unusual nature, but still there is a reddendum, there is something to be paid, and therefore the legal effect of it is, that every thing which it comprehends is in the nature and character of rent, and will go with the reversion of the interest in the land. Now the lessor is seised both of the close and of the mill; and in demising the former he stipulates not only for a money rent, but also that the corn grown thereon shall be ground at the mill, and while both the mill and the close are united in one person, that covenant is certainly beneficial to the reversioner. Nor is this reddendum altogether singular in its nature; there might various instances be put in which services of various kinds have been covenanted for in lieu of rent, all of which have been held to be in the nature of a rent, and as such to constitute a covenant running with the land. For example, the owner of a manor may grant a lease, and stipulate that the lessee shall, from time to time, carry coals to his house,

or perform certain services on different parts of his demesne. Such covenants would fall within the same principle so long as the estate on which the services were to be performed belonged to the same proprietor. So in this case there is a service to be rendered to the reversioner, which is in the nature of rent, and this seems to me to be even a stronger case than that put in *Spencer's* case, because there nothing was taken from the covenantee in the relation of tenant, whereas here there is; and therefore à fortiori the covenant enures to the benefit of the assignee. It is not necessary, on the present occasion, to decide what the effect of this covenant would be if the ownership of the mill and the close were severed. Here they are united, and, on the short ground, that the service rendered here is in fact a rent, and is to be performed in respect of the land demised, I am of opinion that this action is maintainable, and that the plaintiff is entitled to the judgment of the Court.

HOLROYD, J.—I am of the same opinion. The case cited from the *Year Books* appears to me fully to govern the present, and indeed to go further in principle than is necessary to support the present action. This is a covenant running with the land at common law. Here the land is demised to *A. B.*, his executors, administrators, and assigns, part of the reddendum is certain suit to be performed at the mill, and it is quite clear from the words of the lease, that that covenant is to enure to the benefit of the assignee of the land. Whether it would also bind the assignee of the lessee, although he is named in the lease, it is not incumbent upon us now to decide, though upon the principle that the profits of the land, and the land itself, are, for such purposes, generally speaking, the same thing, I am inclined to think that it would. Nor are we in the present instance called upon to declare what would be the effect of this covenant if the reversion interest had been severed; here it is not severed; the assignee of the lessor has the interest

in both the land and the mill, and therefore it is a covenant running with the land, and may clearly be declared upon by the plaintiff, who is interested in the land.

BEST, J.—I am also of the same opinion, but I must add, that my opinion is founded entirely upon the fact that the reversion of both the estates belongs to the same individual; for if the two interests had been severed, I think the case would have assumed a very different complexion. This action is brought upon a very wholesome and beneficial statute, the 32 *Hen.* 8, c. 34, the object of which was to provide that the assignee of a lessor should stand, as regarded his interest in the land, precisely in the same situation as the lessor himself. Upon that principle this action seems to me to be clearly maintainable by the present plaintiff, and by no other, for he is the only person who sustains an injury by the defendant's withholding the suit and service at the mill, and he certainly does sustain an injury, because the covenant is evidently a beneficial covenant to the reversioner as the owner of the mill. I also agree that the service stipulated for in this reddendum is in the nature of a rent, and therefore the covenant runs with the land; but I do not think that it should be a rent by name, in order to support this action. One of the conditions upon which it is stipulated, that the lessee shall hold the land, is, that he shall grind his corn at the mill. He accepts the lease, and enters upon the land on that condition; and why is he not bound to perform that, as well as any other condition that his lease may contain? I can see no reason for making any distinction between this covenant and any other entered into by a lessee, and therefore I am of opinion that as he has violated his agreement in this respect, he is liable to answer for that violation in the present action.

Judgment for the plaintiff.

1823.



Doe, on the several Demises of W. Orpe and J. Orpe, v. John Frost.

Testator devises a portion of his lands to his daughters *E.* and *A.*, to be equally divided between them at his death, and wills that at their respective deaths their respective shares shall be equally divided between their several and respective children; but if *A.* dies without issue, then he gives her share to *E.* for life, and at her decease, to her children, share and share alike. He then gives to all his grand-children who shall be living twelve months after his death 5*l.* each. The residue of his real and personal estate he gives to his only son *B.*; but if he dies without issue, then he gives his share of the estate to all the grand-children who should be then living, share and share alike. Then he introduces certain qualifications respecting the devises he had so made, and for the first time mentions any of his grand-children by name. First, he directs that such of these *last* shares as should belong to his grand-daughter *E. S.* should be placed in the hands of her father, *W. O.*, his executors or assigns, the interest to be paid her during her life, and at her death the principal to be divided among her children, share and share alike. Next he specifically directs that such share or shares of the land he had devised to his daughters *E.* and *A.*, and likewise such share or shares of money as might become due by virtue of the will, to his grandson and grand-daughter *Robert* and *Hannah* (children of his daughter *E.*), should be placed in the hands of their brother *James*, his heirs or assigns, to pay the rents, &c. to them during their lives, and after their death, his or her respective shares to be equally divided among his or her children, if such there are; if not, such shares to become the property *of his or her heirs or assigns for ever*. Nevertheless, if the brother *James* should at any time thereafter think right and proper, he might deliver up to *Robert*, at *any sooner period, all or any part of his share or shares, unto his only proper use, his heirs and assigns for ever*:—Held, that if the disposing part of the will did not give an estate in fee to testator's daughters *E.* and *A.*, and their children, yet it was clear from the qualifying parts that such was his intention, and consequently that the children of *E.* (*A.* having died without issue) took an estate in fee in the land so devised to their mother.

EJECTMENT for certain lands and tenements in the county of *Derby*. At the trial before *Richards*, C. B., at the *Summer* Assizes, 1821, for the county of *Derby*, a verdict was found for the plaintiff, subject to the opinion of the Court, upon the following case:—

John Massey, being seised in fee of the lands and tenements mentioned in the declaration, by his will, bearing date 29th of *October*, 1799, devised as follows: "I will and order that all my just debts and funeral expences be first fully paid and discharged: I give to my daughter *Ann Massey*, one bed, and furniture thereto belonging. I give to my two daughters, *Elizabeth Frost* and *Ann Massey*, the *Breachfield, Intake,* and the *Birches,* and lands formerly taken out of the *Breachfield,* now lying together, and called *The Birches,* by estimation 12 acres (be the same more or

less), and the *Alder Close*, to be equally divided between them at the time of my decease; and, at the death of my daughter *Elizabeth*, her share of land to be equally divided between her children; and at the time of my daughter *Ann*'s decease, her share of land to be equally divided between her children; but if *Ann Massey* dies without issue, then I give her share of land to my daughter *Elizabeth Frost* for her life, and, at her decease, to her children, share and share alike. I give all my grand-children as shall be living twelve months after my decease, the sum of 5*l.* each. All the rest, residue, and remainder of my real and personal estate, I give to my son *Bartholomew Massey*; but if in case he dies without issue, then I give his share of my real estate to all my grand-children that shall be then living, share and share alike. But it is my will, that such of these last shares as shall belong to my grand-daughter *Ellen Smith*, shall be placed in the hands of her father *William Orpe*, his executors or assigns, and the interest thereof, after the rate of 4*l.* 10*s.* per cent. per annum, to be paid to her during the term of her natural life; and at the time of her decease, the principal to be divided among her children, share and share alike. And it is likewise my will, that such share or shares of such lands as I have bequeathed as above, to *Elizabeth Frost* and *Ann Massey*, and likewise such share or shares of money as may happen to become due by virtue of this my will, to my grandson and grand-daughter *Robert* and *Hannah Frost*, shall be placed in the hands of their brother, *John Frost*, his heirs or assigns, and the rents, issues, and profits of such share or shares of lands, and likewise interest for such share or shares of money, after the rate of 4*l.* 10*s.* per cent. per annum, to be paid to them during the term of their natural lives; the receipts of the said *Robert* and *Hannah Frost* to be the only sufficient discharge for the same; and after their decease, his or her said respective shares to be equally divided among his or her children lawfully begotten, if such there are; if not, to

1823.
Doe
v.
Frost.

become the property of his or her heirs or assigns for ever. Nevertheless, if my said grandson, *John Frost*, shall at any time hereafter see or think it right or proper, it is my will that the said *John Frost* may deliver up or pay to the said *Robert Frost*, at any sooner period, all or any part of his said share or shares, for his better maintenance or advancement in the world, unto the only proper use of the said *Robert Frost*, his heirs and assigns, for ever." The lands devised to *Ann Massey* and *Elizabeth Frost*, are the lands mentioned in the declaration. *John Massey* died after making this will, being then, and at the date of the will, seised of other lands besides those specifically devised to his daughters *Ann Massey* and *Elizabeth Frost*, and leaving his said daughters, and another daughter, named *Sance Orpe*, wife of *William Orpe*, and the said *Bartholomew Massey*, his only children, him surviving. The said *Bartholomew Massey* was the only son and heir at law of the said *John Massey*. Upon the death of the testator, *Ann Massey* and *Elizabeth Frost* entered upon and took possession of the lands devised to them, which are the same as those mentioned in the declaration. *Ann Massey* soon afterwards died unmarried, and without leaving lawful issue, upon which *Elizabeth Frost* took possession, and entered into the receipt of the rents and profits of the entirety of the said lands, and so continued up to her decease. At her decease she left three children, namely, *John Massey Frost* (described in the said will as *John Frost*) *Robert Frost*, and *Hannah Frost*, now the wife of *William Frost*, who are respectively named in the said will. Upon her decease, *John Massey Frost*, *Robert Frost*, and *Hannah Frost*, entered into possession of the said lands, and so continued until the decease of *John Massey Frost* in *January* last. *John Massey Frost* by his will devised his estate and interest of and in the said lands to *John Frost* and his heirs, he being his eldest son and heir at law. *Bartholomew Massey*, the son and heir at law of the testator *John Massey*, died during the life of *Elizabeth*

Frost, unmarried, without issue, leaving her and *Sance Orpe* his only sisters and co-heiresses at law. *Bartholomew Massey* by his will devised all his real estate (excepting certain parts thereof, not comprising the lands mentioned in the declaration, or any estate or interest therein) to *Sampson Copestake*, *William Orpe* the elder, and *John Massey Frost*, their executors, administrators, and assigns, for and during the term of ninety-nine years, upon certain trusts, in favour of *Sance Orpe*, with a proviso for the lessor of the said term upon her decease; and the said term is now determined or defeated; and from and after the expiration, or sooner determination of the said term, he devised all and singular the messuages, lands, tenements and hereditaments comprised in the said term of ninety-nine years, to his nephew *William Orpe* the younger, To hold to him, his heirs and assigns, for ever. At the time of the death of *Bartholomew Massey*, there were living the said *William Orpe* and *John Orpe*, the lessors of the plaintiff, sons of the said *Sance Orpe*, who was one of the children of the testator *John Massey*, and *Ellen*, *Bray*, *Ann*, *Sance*, *Mary*, and *Prudence*, six daughters of the said *Sance Orpe*; and, the said *John Massey Frost*, *Robert Frost*, and *Hannah Frost*; the three latter being sons and daughter of the said *Elizabeth Frost*, and *all of them* grand-children of *John Massey*, the testator. *John Orpe* was eldest son and is heir at law of *Sance Orpe*; and *John Massey Frost* was eldest son and heir at law of *Elizabeth Frost*. *Prudence*, one of the daughters of *Sance Orpe*, died intestate and unmarried soon after the death of *Bartholmew Massey*, leaving *John Orpe* her brother and heir at law. *Sance Orpe* the elder is also dead, and *John Orpe* is her eldest son and heir at law, and also one of the coheirs of the testator *John Massey*, and *Bartholomew Massey*. The question for the opinion of the Court is, whether the lessors of the plaintiff are entitled to recover. If the Court shall be of opinion that they are not entitled to recover, a nonsuit to be entered.

1823.

Doe v. Frost.

Preston, for the plaintiffs. Under the will of *John Massey*, his daughters, *Elizabeth Frost* and *Ann Massey*, were merely tenants in common for their respective lives, and the devise over to the children of the former carried only a life estate to them. *Elizabeth* having left children, and the fee therefore not having vested in *Elizabeth* and *Ann*; and the particular estate in one-third part of each moiety being determined by the death of *John*, the eldest son of *Elizabeth*; the reversion in fee passed to *Bartholomew* in tail, with remainder in fee to the grand-children who survived him. The lessors of the plaintiff, being two of those grand-children, are consequently entitled in their own right, and in right of *John Orpe*, as heir at law of his sister *Prudence*, to three eleventh shares of that third-part in which the particular estate was so determined. The gift to grand-children being confined to such of them as were not within the compass of the former gift, the lessors of the plaintiff are further entitled to three-eighth shares of that part in which the particular estate was so determined. So far as respects those lands of which the testator *John Massey* had made no specific devise, the lessor of the plaintiff *W. Orpe*, as devisee of *Bartholomew*, becomes entitled to all the shares in which the particular estates were determined. And the legal estate being by the sound construction of the will vested in *Bartholomew*, *W. Orpe*, the lessor of the plaintiff, is entitled to the legal estate of the entirety as devisee of *Bartholomew*; or *J. Orpe*, the other lessor of the plaintiff, is entitled to one moiety, as the co-heir at law of the testator, *John Massey*. He cited *Doe* v. *Vaughan* (a), *Hodges* v. *Middleton* (b), *Evans* v. *Astley* (c), *Somerville* v. *Lethbridge* (d), *Driver* v. *Frank* (e), and *Jenkins* v. *Karns* (f).

Amos, for the defendant. Upon the death of *Ann Massey* without issue, the entire property vested in the first place

(a) Ante, vol. i. 52.
(b) 1 Doug. 431.
(c) 3 Burr. 1570.
(d) 6 T. R. 213.
(e) 3 M. & S. 25.
(f) 3 Bulstr. 127.

in *Elizabeth Frost* for life, with remainder to her children, as tenants in common, in fee. A fee at least was given by the will in the shares of two of those children, *Robert* and *Hannah*, either to *John Massey Frost*, as trustee for them, or for them and their issue; or to themselves absolutely, or to themselves and their issue; and consequently a fee was given in the remaining share to *John Massey Frost*, as to the other of *Elizabeth Frost*'s children, and is now vested in the defendant as the devisee and heir at law of the said *John Massey Frost*. This appears, first, because he was one of a class, the remainder of whom were to have fees, and therefore the principle "noscitur a sociis" applied; and, secondly, the concluding part of his will expresses the construction which he himself put upon the word "shares," used in the disposing part. He cited *Denne* v. *Page* (*a*), *Gough* v. *Howarde* (*b*), *Evans* v. *Astley* (*c*), *Hay* v. *Coventry* (*d*), *Spalding* v. *Spalding* (*e*), *Roe* v. *Daw* (*f*), *White* v. *Barber* (*g*), *Doe* v. *Applin* (*h*), *Wild's* case (*i*), *Doe* v. *Lyde* (*j*), *Right* v. *Sydebotham* (*k*), *Denn* v. *Gaskin* (*l*), and *Braybrooke* v. *Inskip* (*m*).

Preston was heard in reply.

The Court took time to consider the case, and

BAYLEY, J. now delivered judgment. We are of opinion that in this case a nonsuit must be entered. The testator devises to his two daughters, *Elizabeth Frost* and *Ann Massey*, the lands in question, "to be equally divided between them at the time of my decease, and at the death of my daughter *Elizabeth*, her share of land to be equally

(*a*) 11 East, 602.
(*b*) 3 Bulstr. 127.
(*c*) 3 Burr. 1570.
(*d*) 3 T. R. 83.
(*e*) Cro. Car. 185.
(*f*) 3 M. & S. 518.
(*g*) 5 Burr. 2703.
(*h*) 4 T. R. 82.
(*i*) 6 Co. Rep. 17.
(*j*) 1 T. R. 593.
(*k*) Doug. 759.
(*l*) Cowp. 657.
(*m*) 8 Ves. 407.

1823.

Doe v. Frost.

divided between her children; and at the time of my daughter *Ann*'s decease, her share of land to be equally divided between her children; but if *Ann Massey* dies without issue, then I give her share of land to my daughter *Elizabeth Frost* for her life, and at her decease to her children, share and share alike." The question is, whether the children of *Elizabeth Frost* (*Ann Massey* having died without issue) took an estate for life only, or whether they took an estate in fee. It is contended on the part of the lessors of the plaintiff, that they took an estate for life only. The argument, on the part of the defendant, is, that they took an estate in fee. In the devise, as far as I have hitherto stated it, there are no words which give an estate of inheritance. There are no words devising the whole of the interest; but it is a general devise, not expressly for life, but a devise which, under circumstances, if there were nothing else in the course of the will to shew the plain and manifest intention of the testator, would give them an estate in fee. If there had been a charge on the children of *Elizabeth Frost*, these words would certainly have been sufficient to give them a fee; but if the estate had been limited, and they had died before a given period, then I doubt whether the words would have been sufficient to give such an estate. But although that part of the will to which I have hitherto referred, appears sufficient to give a fee, yet there is a subsequent part of the devise, from which it is clear and manifest that it was the intention of the testator that the fee should pass. Perhaps I should express myself more correctly, if I were to say, that the testator, in the latter part of the will, has used words which he *considered* as passing the fee, and by which he meant the fee should pass. Referring to the plan of the will, I think it may be divided into two parts. One I should call the disposing, and the other the qualifying part. Hitherto I have only mentioned what I call the disposing part, which ends in the way in which it might naturally be expected the disposing part of a will should end, namely, with the resi-



duary clause. At the close of the disposition I have already mentioned, the testator says, "I give all my grand-children as shall be living twelve months after my decease, the sum of 5*l*. each. All the rest, residue, and remainder of my real and personal estate I give to my son *Bartholomew Massey*. But in case he dies without issue, then I give his share of my real estate to all my grand-children that shall be then living, share and share alike. But it is my will that such of these last shares as shall belong to my grand-daughter *Ellen Smith*, shall be placed in the hands of her father, *William Orpe*, his executors or assigns, and the interest thereof, after the rate of 4*l*. 10*s*. per cent. per annum, to be paid to her during the term of her natural life, and at the time of her decease, the principal to be divided among her children, share and share alike." There ends the disposing part of the will. The testator uses the term "share," so as to shew that he had been dividing the property into so many distinct and entire shares. Having finished with the disposing part, he comes to that which appears to me to be the qualifying part of the will. Amongst other objects of his bounty, he had given something to *Ellen Smith*, one of his grand-children, and he qualifies the disposition by these words :—" But it is my will that such of these last shares as shall belong to my grand-daughter *Ellen Smith*, shall be placed in the hands of her father *William Orpe*, his executors or assigns, and the interest thereof, after the rate of 4*l*. 10*s*. per cent. per annum, to be paid to her during the term of her natural life; and at the time of her decease, the principal to be divided among her children, share and share alike." Now, there are no words of gift in that disposition of the property, in which he directs that her share shall be divided among her children; but it is obvious, from the terms of that part of the will, that he considered that he had been giving her an interest, and used words by which he clearly meant she should have an interest to continue longer than a life estate. Having, therefore,

qualified the disposition which he had previously made in favour of his grand-daughter, *Elizabeth Smith*, then comes that qualification which applies to the devise in question. "And it is likewise my will, that such share or shares of such lands as I have bequeathed as above to *Elizabeth Frost* and *Ann Massey*, and likewise such share or shares of money as may happen to become due by virtue of this my will to my grandson and grand-daughter, *Robert* and *Hannah Frost*, shall be placed in the hands of their brother *John Frost*, his heirs or assigns, and the rents, issues, or profits of such share or shares of lands, and likewise the interest for such share or shares of money after the rate of 4*l.* 10*s.* per cent. per annum, to be paid to them during the term of their natural lives; the receipts of the said *Robert* and *Hannah Frost* to be the only sufficient discharge for the same, and, after their decease, his or her said respective shares to be equally divided among his or her children lawfully begotten, if such there are; if not, to become the property of his or her heirs or assigns for ever." Therefore he qualifies the disposition to *Robert* and *Hannah Frost*, by stating that if they have children, then those children shall take the property. It is only in the event of their having no children that it is to go to them, their heirs or assigns for ever. Then comes another clause:—"Nevertheless" (which is a qualification of the preceding qualification) "if my said grandson, *John Frost*, shall, at any time hereafter, see or think it right or proper:—it is my will that the said *John Frost* may deliver up, or pay to the said *Robert Frost*, at any sooner period, all or any part of his said share or shares, for his better maintenance or advancement in the world, unto the only proper use of the said *Robert Frost*, his heirs and assigns for ever." Now it will be recollected that there is no disposition to *Robert*, *Hannah*, and *John Frost* by name. The disposition to them is as to *a class*, namely, "to the children of *Elizabeth Frost*, share and share alike." If we could see from any part of the will that it was the clear

1823.

Doe v. Frost.

intention of the testator to use the words of disposition in their favour, as to any of them, so as to give a fee, that would throw a light upon the question, and afford a ground for legally concluding that each of them should have a fee in the share or gift to him or her. But when we consider this will as being properly divisible into a disposing part, and a qualifying part, the qualifying part shews clearly, that though in the disposing part the testator had thought he had used words which had sufficiently expressed his intention of passing the fee, yet he was determined, in the qualifying part, to use words which should leave no room to doubt that such was his intention; for the qualification as to *Robert* and *Hannah* is simply this: "That which I gave you *Robert* and *Hannah*, for and during your lives, is to be under the control and management of your brother *John Frost* (who is one of the children of *Elizabeth Frost*, and to whom, as one of the class, there is a disposition), and when you respectively die, though you shall have the fee if you die without issue, yet if you do not die without issue, and leave issue, then the property shall be divided between your children, share and share alike." But even this is not absolutely so, for if *John Frost* shall think it right and proper, *Robert*, his brother, shall take the immediate fee before the time of his death. We think this qualification as to the disposition to *Robert* and *Hannah Frost*, shews most clearly that in the words which the testator had previously used, he meant to give them a fee; and if he *meant* to give them a fee, the necessary and legal consequence must be, that he should be considered as having used the words, in order to leave them the fee. For these reasons, we are of opinion, that under the particular words of this will the limitation to the children of *Elizabeth Frost*, did not give a life interest only, but the absolute fee, and therefore the defendant is entitled to judgment.

Postea to the defendant.

Wednesday, April 16.

The time within which the undertaking and security required to be given by 1 *Geo.* 4. c. 87. shall be given, is to be fixed *by the Court at the time* the rule under that statute is granted.

Doe, d. Marquis of Anglesey *v.* Brown.

IN a former case of *Doe* v. *Roe* (*a*) the present defendant was ordered to give the undertaking, and enter into the security required by 1 *Geo.* 4. c. 87. The rule in that case was served on the 27th *February* last, and an appointment made to attend before the Master to fix the amount of the security on the 28th, on which day the plaintiff's attorney attended, and the Master fixed the security at 200*l*. Neither the rule, nor the Master's appointment, expressed the time within which the security was to be given. Notice was immediately given to the defendant of the amount fixed by the Master, and that unless the security was given by the 3d of *March*, final judgment would be signed. No security was given; and on application to the clerk of the rules to sign final judgment it was refused, on the ground that the plaintiff should have produced a Judge's order for that purpose. The Lord Chief Justice was then applied to for such order, but his Lordship declined giving it, having some doubt whether the original rule was not defective in not stating the time within which the security was to be given, and

Jeremy now prayed, upon an affidavit stating these facts, either that the plaintiff should be at liberty to sign final judgment instanter, or that the Court would amend the rule, by inserting into it some reasonable time within which the defendant should enter into the recognizance, or in default thereof the plaintiff should sign final judgment. The plaintiff had not been guilty of any negligence; for by the words of the act, which were equivocal, it seemed doubtful, whether the Court, or the Master, was vested with the power

(*a*) Ante, 565.



of fixing the time for entering into the security. The act stated, "that it shall be lawful for the Court, upon cause shewn, or upon affidavit of the service of the rule, in case no cause shall be shewn, to make the same absolute, and to order such tenant, *within a time to be fixed,* to give such undertakings, &c."

Per Curiam.—The proper construction of this part of the statute clearly is, that the Court shall fix a time for the recognizance to be entered into, at the time when they grant the rule for that purpose. In this respect the rule, in this case, is defective, and cannot be acted upon in its present form; but as the mode of proceeding might be considered doubtful, we will now amend the rule by fixing the time. Therefore let the defendant enter into the recognizance fixed by the Master within fourteen days from this time, or else the plaintiff to sign final judgment.

Rule amended accordingly.

The KING v. The JUSTICES of BUCKINGHAMSHIRE.

Thursday, April 17.

Whether a rector who lets his tithes by parol to the occupiers of the lands, in respect of which the tithes arise, and receives a half-yearly composition in the nature of rent, can be treated as an *occupier* of tithes within the meaning of the General Highway Act, 13 *Geo.* 3. c. 78. s. 34, and rateable to the highways in the parish.

In a case where Justices have reasonable ground for doubting their jurisdiction, the Court will not compel them to do an act which may subject them to an action.

THIS was a rule calling upon two Justices of the county of *Buckingham*, to shew cause why a mandamus should not issue, commanding them to grant a warrant of distress for enforcing payment from the Rev. *J. T. A. Reed*, rector of *Leckhampstead*, in the said county, of the sum of 18*l.* 18*s.* to the surveyor of the highways of the same parish, being the amount of his composition, in lieu of statute duty, as occupier of the tithes of the said parish.

1823.

The King v. The Justices of Buckinghamshire.

On shewing cause against the rule, the facts disclosed upon the affidavits were these:—Mr. *Reed*, as rector of the parish of *Leckhampstead*, was seised of the parsonage-house, with the gardens, &c. and home close; containing about three acres belonging thereto, and seventy-seven acres of ancient glebe land, and also of the great and small tithes of all other lands in the parish, to the extent of 2400 acres and upwards. The parsonage-house, &c. and home close were in his own occupation, in respect of which he paid a composition, in lieu of statute duty, for the repair of the highways in the parish. The seventy-seven acres of glebe land he had let by parol from year to year to a tenant, who performed or compounded for statute duty in respect of his occupation as tenant. The tithes arising from the other lands in the parish had been let by parol to the farmers or occupiers of the lands, and had never been taken by Mr. *Reed* in kind, and the rents payable to him in respect of the tithes were reserved and received by him by equal half-yearly payments, the first of which became due at *Lady Day* in every year. The tithes were not bargained and sold by him to the farmers and occupiers when in a state of maturity, but were let to them prospectively, and without any reference to the specific mode of cultivation. During the period of his incumbency, he had not had any waggon, cart, chaise, or carriage of any description, nor any team, draft, or plough, nor had he ever hired or made use of any waggon, &c. nor had he in any manner used the highways within the parish, as occupier of tithes, nor otherwise than as occupier of the parsonage-house, &c. and home close, but he had occasionally hired a post chaise for the use of his family. For thirty-two years previous to his incumbency, during which he was resident curate of the parish, the tithes had been let in like manner to the farmers and occupiers of the land, and during all that period neither the rector for the time being, nor any other person or persons than the said farmers or occupiers, had performed or compounded

for, nor were called upon or required to perform or compound for the statute duty, for or in respect of the said tithes. At a Special Sessions, held in *October*, 1822, by an order of two Justices, the several sums of money therein mentioned were adjudged to be reasonable compositions to be paid by all persons liable to perform statute duty within the parish of *Leckhampstead*, and the usual notices were given by the surveyor of the highways to all persons inclined to compound for their statute duty, and they were required to signify their intention to compound for the same on a day mentioned, and at such time to pay their composition. A meeting of the parishioners took place in pursuance of the notices, at which Mr. *Reed* attended, when he was informed that the parishioners and inhabitants considered him liable, as occupier of the tithes, to perform statute duty, or to pay a composition in lieu thereof, but he declared his opinion that he was not liable, and expressed his determination not to perform statute duty, or pay any composition. In 1821 a valuation had been made of all the lands and tithes in the parish, in order to the better assessment and collection of the poor rates in which the tithes belonging to the rector were valued, at 354*l.* 13*s.* 10*d.* yearly, at which value Mr. *Reed* was rated and assessed to the relief of the poor as occupier of the tithes, and had paid the same accordingly. No appeal having been entered against the order of the Justices above mentioned, the surveyor of the highways demanded of Mr. *Reed*, as occupier of the tithes, the sum of 18*l.* 18*s.* as a composition, in lieu of his statute duty, according to the rates previously allowed by the Justices; but having refused to pay the same, he was summoned by the surveyor at a Special Sessions to pay the same. But the Justices were of opinion that Mr. *Reed*, having let or compounded for his tithes, the whole statute duty ought to be paid by the farmers as the occupiers of the tithes, and as Mr. *Reed* was not an occupier of tithes within the meaning of the General Highway Act, 13 *Geo.* 3. c. 78. s. 34, he

1823.

The KING v. The JUSTICES of BUCKINGHAMSHIRE.

was not liable to be rated; and consequently they refused to grant a warrant of distress for enforcing payment of the composition assessed upon him in lieu of statute duty. The question now was, whether, under these circumstances, Mr. *Reed*, having entered into a composition with his parishioners, and received a money payment in lieu of tithes, could be considered as an occupier of tithes within the meaning of the General Highway Act.

Dover shewed cause against the rule. The amount of composition in this case is not a matter of contest, nor is it contended that mandamus is not the proper remedy in a case of this description; neither will it be denied that an ecclesiastical person is liable to the highway rate as occupier of tithes; but it is insisted, under the circumstances disclosed in the affidavits, that Mr. *Reed* is not the *occupier* of tithes in the sense in which that word is used in the General Highway Act, 13 *Geo.* 3. c. 78. s. 34. The tithes, in this case, are clearly not *occupied* by Mr. *Reed*. The mode of compounding for the tithes which has been adopted, creates merely the relation of landlord and tenant. They are not bargained and sold at the time when they are in a state of maturity, but are let prospectively from year to year, and a money rent is payable half-yearly, and the tenancy so created can only be determined by a six months' notice. So long therefore as this tenancy subsists, he cannot be considered as the occupier, and consequently the person who has not the actual occupation is not liable to the highway rate. The affidavits state that Mr. *Reed* keeps no waggon, cart, or other carriage, nor is there any circumstance in the case which will bring him within the words of the Highway Act. At all events, considering this as a doubtful question, the Court will not compel magistrates by mandamus to do that which may subject them to an action, if they should grant a distress warrant.

The Court stopped him, and called upon the other side to shew by what authority a mandamus could be granted to compel magistrates, in a doubtful case, to do an act which might subject them to an action.

Marryat and *G. Marriott*, contrà. The surveyor of the highways has no remedy, if the Justices shall not be compelled to grant their warrant to enforce the payment of the rate. The Highway Act provides, that the rate shall be levied by warrant of distress and sale. Now the magistrates have been applied to for their warrant, and they have refused to grant it, assigning reasons for such refusal; but the Court will not enter into the grounds of refusal, and there is no reason in point of law why the magistrates should not be compelled to issue their warrant, there being no other mode of levying the rate. They cited, upon this point, *Rex* v. *The Justices of Middlesex* (a), *Stevens* v. *Evans* (b), and *Rex* v. *The Justices of Somersetshire* (c). Assuming that, in a doubtful case, the Court would not grant a mandamus, still this cannot be considered as a question of any difficulty. The rector must, for the purpose of rateability, be considered as the occupier of the tithes. There are several cases which decide that a parson who compounds for his tithes is still to be considered as the occupier, and rateable to the relief of the poor. *Rex* v. *Lambeth* (d), *Regina* v. *Bartlett* (e). In this case Mr. *Reed* is rated to the relief of the poor in respect of these very tithes as occupier, and there seems no good reason why he should not be rated in like manner to the repair of the highways. The composition in lieu of tithes makes no difference as to the question of occupation,

(a) 1 Wils. 125.

(b) 2 Burr. 1152. S. C. 1 Sir W. Bl. 284.

(c) 2 Stra. 992.

(d) 1 Stra. 525.

(e) 16 Vin. Abr. tit. Poor, 427. The case there stated was this:— A parson who lets his tithes to the parishioners may be taxed upon the poor rate; for the letting is but an agreement with the parishioners to retain the tithes; and the parson here has a modus for his tithes, though it was objected that the parishioners were occupiers, and so the parson not rateable.

1823.

The King v. The Justices of Buckinghamshire.

because the clergyman is beneficially interested in the land in respect of which the tithes arise. Neither does the mode of paying the composition make any difference, because it is perfectly immaterial whether he receives the composition in one or in two payments. According to all the determinations of this Court upon the subject of rateability to the poor, a clergyman who receives a composition in tithes, is still to be deemed as the occupier of the tithes, and upon this principle the clergyman in this case must be deemed the occupier, and consequently the person liable to pay the highway rate.

Abbott, C. J.—It is quite clear that we ought not to grant a mandamus in this case. If we should grant the writ, and the money should be levied under the warrant of distress, Mr. *Reed* might bring an action against the Justices, and try the validity of that act, which we had compelled them to do. Since I have had the honor of sitting in this Court, I have always expressed very great reluctance in compelling magistrates to do any thing which might subject them to the chance of an action. In those cases where the duty of the magistrate is clear and explicit, we interfere by mandamus, and suffer no idle suggestion, that an action may be brought to prevail with us; but where we cannot see that his duty is plain and obvious, but may be matter of doubt, we do not so interpose. Now, in this case, I must own there is considerable doubt upon the whole matter, whether, under the circumstances, this clergyman can be considered as the occupier of the tithes within the meaning of the General Highway Act. The question being doubtful, I think we ought not to compel the magistrates to issue their warrant. I forbear saying any thing more, than that I entertain doubt upon the question. I do not wish to prejudge a question which may hereafter be considered, should any other magistrates be found who shall issue their warrant, and thereby raise the

1823.

The King v. The Justices of Buckinghamshire.

point for discussion. When such question shall be raised, it will be the duty of the Court to hear it discussed, and decide upon it. At present I wish to be understood as giving no judicial opinion upon it, and that the ground on which I discharge this rule is, that I cannot myself clearly see that these magistrates may not be subjected to an action, if they should issue their warrant.

Bayley, J.—In a doubtful case the Court never grant a mandamûs to Justices. The public are very much indebted to the magistracy of the country for the voluntary and gratuitous manner in which they discharge their public duties; and we ought not, in a case admitting of a fair degree of doubt, to subject them to the expence and hazard of an action, or require them to make a return to a writ of mandamus. Now, as far as I can judge, this case fairly admits of the doubt which the magistrates have raised. It has been argued, that because Mr. *Reed* is rateable to the relief of the poor in respect of his tithes, under the statute 43 *Eliz.* c. 2, he is therefore liable to contribute to the highway rates. I think that by no means follows. The words of the General Highway Act, and the statute of *Elizabeth*, are very different. Under the latter statute, tithes are not rateable eo nomine. The occupier of tithes, qua occupier, is not rateable, and the only words of the statute which give the power of reaching tithes, as a subject of rate, are "parson, vicar, tithes impropriate, and propriations of tithes;" but common rectorial or vicarial tithes are not mentioned. Why are they not mentioned? Probably because the legislature at that time meant to impose the burthen upon the parson and the vicar, and not upon other persons who were the occupiers of tithes. In the case of *Rex* v. *Lambeth* the decision proceeded upon this footing, namely, that the vicar was liable to the poor rate in his character of vicar, and not because he was occupier. In the case of *Regina* v. *Bartlett*, the letting of tithes was not a

1823.

The KING v. The JUSTICES of BUCKINGHAMSHIRE.

letting from year to year, by way of retainer to the different parishioners, but a bargain or agreement pro hâc vice, (as far as I can judge, from the short statement of that case in *Viner's Abridgment*,) and I cannot help thinking that there may be a difference between the case of a regular yearly letting, by way of retainer to the different occupiers of lands in the parish, and the case of an agreement with the parishioners to retain the tithes. Of this, I am sure, that the attempt now to raise this question for the first time, and to endeavour to throw this burthen upon the rector, will have a tendency to force clergymen into disputes with their parishioners, and to prevent them from entering into a composition, which is generally beneficial to the parishioner.

HOLROYD and BEST, Js. were absent.

Rule discharged, with costs.

Thursday, April 17.

The certificate of an agent for *Lloyd's*, at a foreign port, ascertaining an average loss upon a cargo damaged by sea water, is not admissible evidence alone of the amount of loss, in an action by the assured against the underwriter, in this country.

DRAKE v. MARRYAT.

ASSUMPSIT upon a policy of insurance, bearing date 20th *July*, 1821, upon the ship *Erin* and her cargo, consisting of 1705 boxes of sugar, "at and from *Matanzas*, to her port or ports of discharge in *Europe*, between *St. Petersburg* and *Bourdeaux*." At the trial before *Abbott*, C. J., at the *London* adjourned Sittings after last *Hilary* Term, certain admissions were put in, from which it appeared that the defendant had subscribed the policy to the amount of 750*l*., and the action was brought to recover his proportion of a particular average loss of 6*l*. 1*s*. 10*d*. per cent., sustained upon part of the sugar, which had received damage in the course of the voyage, and was landed and sold in a damaged state at *St. Petersburg*. The sugar was

sold on arrival by private contract. In the contract of sale it was provided, that a fair allowance should be made to the purchaser for the damaged part, and in order that the damage might be properly ascertained, and with a view to recovery from the underwriters, the consignee applied to Mr. *Gisborne*, the agent for *Lloyd's* at that place, for his directions as to the mode of ascertaining the same; and according to Mr. *Gisborne's* directions, two sworn brokers were appointed, the one chosen by himself, and the other by the consignee, to make a survey. The brokers made a survey in the presence of Mr. *Gisborne*, and certified that the purchaser was entitled to an allowance of six rubles per pood upon 482 boxes of the sugar. The following certificate was given by Mr. *Gisborne*:—

"I hereby certify, that having surveyed the above specified 482 boxes of sugar on their landing at this custom-house, I found them severally damaged by sea water, and also, that after a very particular inspection of them by Messrs. *Fehleison* and *Jordan*, sworn brokers, in my presence, an allowance of six rubles per pood was awarded to the purchaser under my approbation and advice. Given under my hand, *St. Petersburgh, September* 30th, 1821.

"THOMAS JOHN GISBORNE,
"Agent for *Lloyd's*."

In pursuance of this certificate an allowance of 6*l.* 1*s.* 10*d.* per cent. was made to the purchaser.

The policy contained the usual memorandum, that the sugar was warranted free from average under 5*l.* per cent., and in order to prove a loss to that amount, the plaintiff proposed to read in evidence Mr. *Gisborne's* certificate, together with his written appointment and instructions as an agent for *Lloyd's* (*a*). All the other facts necessary to esta-

(*a*) In the instructions given by the committee at *Lloyd's* to their agents at foreign ports, it is, among other things, declared, that when the agent is called upon by consignees to ascertain damage on goods, he is "to act as a surveyor only, and in this capacity to see that the sound part of every package is separated from the damaged, and particularize

blish the plaintiff's case were admitted, and the only question was, whether Mr. *Gisborne*'s certificate was admissible evidence alone of the particular average loss. The learned Judge being of opinion that it was not, and no other evidence of the amount of the loss being produced, a nonsuit was directed, with liberty to move to set aside the nonsuit, and enter a verdict for the plaintiff.

Campbell now moved accordingly, and contended, upon the authority of *Read* v. *Bonham* (a), that Mr. *Gisborne* being the authorised agent of the committee at *Lloyd's*, was in effect the representative and agent of the underwriters generally, and of the defendant in this instance, (who was a subscriber at *Lloyd's*) so far as to render his certificate of the amount of loss, duly executed at *St. Petersburg*, and verified here, legitimate evidence to prove the loss. The agent is instructed by the terms of this written appointment to act as a surveyor; he is to sign a certificate of his estimate of the damage, and is to form his judgment upon reading certain documents specified in the appointment. It is indeed provided, that he is not to make up or sign any statement of average as representative of the underwriters, and therefore it cannot be contended, that his acts are to be binding upon the under-

the quantity of each in his certificate, taking care in the first instance to satisfy himself that the goods were properly stowed, and that the damage was occasioned by sea water whilst on board. The agent is not to make up or sign any statement of average either general or particular, as representative of the underwriters, leaving that to be adjusted between them and the assured, upon the documents which he furnishes." And after some further instructions on other heads, one of the concluding observations is as follows:—"From the preceding instructions it will be inferred, (but to avoid the possibility of misconception it is repeated,) that in every act of interference, whether by advice or otherwise, the agent is not to be considered as the representative of the underwriters upon any particular policy, except when he is specifically instructed to that effect, but as a person, whose duty it is, from the nature of his appointment, to attend to the interest of the subscribers to *Lloyd's* in general, and protect them from fraud and imposition in the mode of treating property in peril, or under damage."

(a) 3 Brod. & Bing. 147.

writer at home, but surely his declaration of the amount of loss, so fully authorised by the underwriters, and founded upon a survey and other cautionary measures specified and directed by them, becomes evidence to go to a Jury, in support of the loss which the assured has sustained. The case of *Read* v. *Bonham* would seem to justify the argument, that the agent for *Lloyd's* was, upon this occasion, the agent for the underwriters also; for it is there said by *Burrough*, J. "I have no conception that a person who is avowedly agent of *Lloyd's*, can say he has no authority to accept an abandonment;" and at least it is not going too far to say, that if he is appointed to do certain acts upon a specific authority, and by direct and precise instructions, the result of those acts, namely, his estimate of the loss, is evidence to prove the fact and amount of that loss.

PER CURIAM.—It is quite clear from the instructions given in evidence, that the utmost power given to the agent for *Lloyd's*, is to furnish documents *for inquiry at home*. He is "not to make any statement of average as the representative of the underwriters," but is "to leave that to be adjusted between them and the assured, upon the documents which he furnishes." Now, the certificate in this case is a statement of average, and is therefore expressly within the prohibitory words of the instructions. It is not made by him as the representative of the parties, it is not binding upon those parties, but is simply a document furnished for the purpose of inquiry into the loss. The case which has been cited is mainly distinguishable from the present; there there was an abandonment of the cargo in this country as soon as the assured was in a situation to make an abandonment; here, there is no abandonment at all. We are asked to introduce a perfectly new head of evidence, and for what purpose? The only object of the proposed evidence is to compel both parties to act upon the certificate of the agent for *Lloyd's*, but according to the rules of evidence, such an

1823.
DRAKE
v.
MARRYAT.

instrument cannot be received for that purpose. He is not the agent of both parties, and though both *may*, in their discretion, adopt his acts, they cannot by law be binding upon them; they can bind only the party whom he represents, and even as respects that party, there is an express provision that he shall not act in the character of a representative. If this be not the object of this evidence, it has in truth no object at all, and in either view of the case, it is clearly inadmissible. It was the duty of the plaintiff to prove his case by plain and legitimate evidence; this he has not done, and therefore the nonsuit was properly directed.

Rule refused.

Thursday, April 17.

The KING v. The COMMISSIONERS of SEWERS in ESSEX.

Where the owner of marsh lands was bound by the custom of a sewage level to repair the sea walls fronting his own estate, and by an extraordinary flood tide the wall was damaged, the Court refused a mandamus to the Commissioners of Sewers to reimburse him for the expence of the repairs, it appearing by affidavit that the wall had been previously presented for irrepair, and was out of repair at the time the accident happened.

THIS was a rule, calling upon the defendants to shew cause why a mandamus should not issue directed to them, commanding them to reimburse *Anthony Harding*, Esq. the sum of 284*l.* 4*s.* expended by him in and about the repair of the damage done on or about the 3d *March*, 1820, to the sea wall abutting on certain lands of his, in the level of *Gray's Thorock*, in the county of *Essex*, together with interest for the same.

On shewing cause against the rule, it appeared from the affidavits, that an immemorial usage had existed in the level of *Gray's Thorock* for the owners of lands therein to repair the sea walls on their own lands, at their own several and respective expence. Mr. *Harding* was the occupier of 147 acres of marsh land in the level of *Gray's Thorock*, and in consequence of an extraordinary high tide and heavy wind in the month of *March*, 1820, the sea wall upon

1823.

The King *v.* The Commissioners of Sewage, Essex.

his land was partly washed away, and occasioned considerable damage, which he was obliged to repair at the expence above-mentioned. It was stated as a fact, and not denied, that previous to this accident the sea wall on Mr. *Harding's* land was in an insufficient state of repair, and that the marsh bailiff had presented it in the year 1819, as being out of repair; whereupon the commissioners had made an order that it should be put into a proper state of repair, but which order had never been complied with. The whole quantity of land in the level was about 1671 acres, and the extent of the sea wall was 931 rods, of which 151 were on Mr. *Harding's* land, being above one-sixth of the whole. The object of this application was to raise the question, whether all the occupiers of lands in the level, who derived benefit from the repair of the sea wall, should not contribute to the expence of such repair, equally, and in proportion to the quantity of land occupied by them respectively, and not according to the accidental circumstance of their having a greater or less quantity of sea frontage.

Tindal and *Brodrick* shewed cause against the rule, and contended, first, that Mr. *Harding* was, by the immemorial usage of the level, as stated in the affidavits, bound to repair at his own sole expence, the sea wall fronting his lands, and consequently was not entitled to contribution from the other land owners in the level; and, second, that supposing him to be relieved from this individual liability when extraordinary and unforeseen accidents occurred, still he was not in a situation to avail himself of such exemption, the accident which had occasioned the expence in question having arisen from the previous bad state of the wall, which had fallen into decay from his own negligence and default. Upon the first point the affidavits are quite decisive as to the question of usage, and there needs no authority to establish the legality of such an usage. It is clearly laid down by *Callis,* in his reading on the statute of Sewers (*a*), amongst

(*a*) Callis, 114.

1823.

The King v. The Commissioners of Sewage, Essex.

the causes and considerations for which a person is bound to keep sea walls in repair, that frontage, ownership, prescription, and custom are sufficient. All these considerations attach in the present case, and impose upon Mr. *Harding* the liability to repair. Undoubtedly the same learned Author mentions certain exceptions from the general liability (a), as, for instance, insolvency of the party bound to repair, in which case the level are to be charged to assist him. So, "if a person be bound to repair the sea bank, but the hazard is so apparently dangerous to the country, that in all likelihood he cannot repair the same, and so the country might be in danger of being overflown, before he alone could do it, then the country on the level are to be rated and taxed towards the same." It is clear, that neither of these exceptions applies to Mr. *Harding*. Then, the question is, whether the next exception can avail him. "If," says *Callis*, "the sea at the spring tides, or at extraordinary casual swelling tides or floods, have broken down the fences, and overthrown the banks, *without any default in the party who was tied to have repaired the same*, the level shall in this case make up the breach, for things, which happened extraordinarily by the sea, or great waters, which neither policy of man could prevent, nor industry or force could resist, are counted inevitable and undefenceable." It is quite clear, that Mr. *Harding* does not come within this exception, because he cannot avail himself of it, unless it distinctly appears that the accident happened without any default on his part. Now, the affidavits expressly shew, that the damage arose in consequence of his default in neglecting to repair the wall, even after the presentment by the marsh bailiff in the year before the accident occurred. It is sworn and not denied, that if the wall had been in a fair and ordinary state of repair, it would have resisted the storm and high tide which occasioned the damage in question, and consequently this cannot be considered as a thing which happened "extraordinarily by the sea, or as inevit-

(a) Callis, 145, 146.

able," or "without any default in the party," and therefore the case is evidently not within this exception. The principle to be deduced from the dictum of *Callis* is, that default in the occupier, is a complete answer to such an application as this; and the same principle is laid down in *Keighley's* case (*a*), The case of the *Isle of Ely* (*b*), (in both which a contrary decision in *Rooke's* case (*c*), was reconsidered and rectified), and in *Rex* v. *The Commissioners of Sewers in Somersetshire* (*d*). Here there is default in the occupier, and therefore he is not entitled to the benefit he seeks by mandamus.

Scarlett and *Berens* in support of the rule. The point principally relied upon in the argument against this application, involves a question of fact respecting the state of the wall, which the Court will not take upon themselves to decide upon affidavits. But there is also a very important question of law connected with this case, which has been almost taken for granted on the other side, upon which no decisive authorities have been produced; with respect to which, grave doubts have been from the very earliest time entertained; and in support of which, both dicta and cases may be found on each side, and almost equally balanced in their claim to attention. The reason, however, of this case, is clearly in favor of the application. Suppose a level of 1000 acres in extent, wholly protected from the sea by one wall; one occupier has 500 acres of the land, which, from their local position, are fronted by only one-tenth part of the wall; and another occupier has 100 acres, which, for similar reasons, are fronted by one-half of the wall; is it to be said that these two are equally liable to repair their own proportion of the wall? Such a liability would be a premium to the one, while it would be ruin to the other, and is utterly subversive of the only just criterion of rateability, namely,

(*a*) 10 Rep. 139 a.
(*b*) Ibid. 141.
(*c*) 5 Rep. 99.
(*d*) 8 T. R. 312.

1823.

The King v. The Commissioners of Sewage, Essex.

the proportion between the wall and the land. The truth of the maxim "salus publicà suprema lex," is not to be impeached, but the public interest is not to be promoted at the expence of the ruin of individuals, nor is one man to be beggared by a liability so exclusively disproportionate to his beneficial interest in the land, while others with ten times his extent of occupation are to bear only a tenth of his burthen. Then, what is the law upon this subject, and how does it bear upon the present case? It is said, that by law occupation and frontage impose a liability to repair, and *Callis* is quoted in proof of the position. It is quite evident, upon a close examination of that author, that wherever he lays down that position, he is referring to the law as it stood before the passing of the statute of Sewers (*a*), and is simply asserting, that by the common law, frontage and occupation would impose the liability. But that statute effected a material change in the law on this subject, and it is manifest, from the language of the Commissioners of Sewers, that the principle intended to be enforced, was, that all occupiers should be fairly and proportionably rated. This principle is recognised in several decided cases, in which the statute of Sewers is considered as bearing the same construction, and having the same object in view. *Rooke's* case (*b*), and *Hetley* v. *Boyer* (*c*). The common law writ on this point breathes precisely the same spirit, and declares that all who are benefited by the wall, shall be liable to contribute to the repair of it in a just proportion (*d*). There appears, therefore, to be nothing either in the common or statute law decisive against the argument now contended for on the part of this applicant, and the other questions arising in this case ought not to be decided on affidavit.

Abbott, C. J.—It is now too late to discuss any general question as to the liability of occupiers of land to repair a

(*a*) 23 Hen. 8. c. 5.
(*b*) 5 Co. 99.
(*c*) Cro. Jac. 336.
(*d*) Fitzh. N. B. 113.

1823.

The King v. The Commissioners of Sewage, Essex.

sea wall by which their estates are bounded. No doubt, the obligation to repair may be general or particular, according to the usage which may prevail in different parts of the kingdom. In some places the obligation may be cast upon particular individuals, or upon all the persons occupying lands in the level. Where the obligation is to fall, must depend upon the usage of each particular district. If by usage, the owners of particular lands are bound to repair, and by usage they have repaired, that usage is evidence that by law they are liable to repair, whatever the usage may be. Now, in this case it is stated, and not denied, that there has been an immemorial usage existing in this level for each land-owner to repair so much of the sea wall as fronted his own particular land. If we were to give effect to the argument which has been urged in support of the rule, we should in effect, be subverting that usage, and changing the whole value and estimate of the level. The usage stated here would be abundant evidence before a Jury to support a prescriptive obligation to repair, and how can we resist such evidence? It is all on one side, and no advantage could be gained by directing an issue. Undoubtedly there are exceptions to the generally liability to repair, as for instance, although a particular individual may be bound to maintain the wall fronting his own land, yet, if he has previously done all that the law requires him to do, and by some extraordinary flood, or other unusual violence of the elements, the wall is not sufficient to afford resistance, then he alone is not to be charged, but the expence of repairing is to be rated upon the whole level. That raises the question, whether, looking to the whole of the affidavits in this case, this wall was in such a state, as that the damage would have happened "without the default of him, who was bound to keep it in repair." If this question were at all doubtful, the Court would not have been prepared to decide it upon affidavits, but the evidence upon

1823.

The KING v. The COMMISSIONERS of SEWAGE, Essex.

it is all on one side. From the affidavits it appears, that prior to this time there had been a presentment that the wall was in an imperfect state of repair. That presentment was never traversed, and the order made upon it by the commissioners was not complied with. Assuming, however, that no such fact appeared, still there are three deponents who state their clear and decided opinion, that if the wall had been previously maintained in a proper state of repair by the front being kept up, it would have prevented the accident which had occurred. There is therefore not even a balance of testimony upon this point, and therefore I think we are justified in discharging this rule.

BAYLEY, HOLROYD, and BEST, Justices, concurred.

Rule discharged, with costs.

Friday, April 18.

DOE v. BRADBURY.

Tenant dies intestate, in possession of certain premises. His widow after continuing to occupy for several years, paying rent to the landlord, marries a second time, and her husband enters into possession and pays rent for several years to the landlord, and, upon the death of the wife, the personal representative of the first husband obtains administration of his estate and effects, and brings ejectment to evict the second husband:—Held, that the action was maintainable without giving a formal notice to quit.

EJECTMENT by the administrator of a person named *Burgess*, to recover possession of certain premises in the county of *Derby*. At the trial before *Park*, J., at the last Assizes for that county, it appeared in evidence that *Burgess*, some years since, died in possession of the premises in question intestate. His widow remained in possession, and paid rent to the landlord for several years. Four or five years since she married the defendant *Bradbury*, who took possession, and continued paying rent to the landlord, with the knowledge of the lessor of the plaintiff.

In the month of *November* last defendant's wife died, and on the 12th of *December* following, the lessor of the plaintiff, who was agent of the landlord, obtained letters of administration of the estate and effects of *Burgess*, the first husband, and, without giving the defendant notice to quit, brought the present ejectment. It was contended at the trial that the action would not lie, inasmuch as the relation of landlord and tenant had never subsisted between the defendant and the lessor of the plaintiff, and that at all events the defendant was entitled to notice to quit. The learned Judge, however, over-ruled both objections, and the plaintiff had a verdict.

N. G. Clarke now moved for a rule nisi, to enter a nonsuit, or for a new trial, and renewed both objections.

Per Curiam.—There is no ground for disturbing this verdict. In a court of law the lessor of the plaintiff is clearly entitled to maintain ejectment. After the death of *Burgess*, the original tenant, his wife was executrix de son tort, until administration was taken out, but having died before administration, the defendant must be considered as occupying the premises as agent for the personal representative of the first husband. The lessor of the plaintiff being personal representative, and having taken out administration, he had a right to put an end to that agency as soon as he thought proper. This state of the case renders it unnecessary that the relation of landlord and tenant should subsist between the lessor of plaintiff and the defendant, the former being in law the personal representative of the intestate. Unless therefore it can be said that the wife, as executrix of her own wrong, was tenant to herself, the objection now urged cannot prevail. If notice to quit were necessary, the service of the ejectment is sufficient notice to maintain this action.

Rule refused.

1823.

Friday, April 18.

Doe, d. The Churchwardens and Overseers of the Parish of Orleton *v.* Harpur.

The statute 59 *Geo.* 3. c.12. s. 17. empowers churchwardens and overseers to take lands and hereditaments in the nature of a body corporate, and declares that in all actions brought in respect thereof, it shall be sufficient to name the churchwardens and overseers for the time being, describing them as the churchwardens and overseers of the poor of the parish for which they shall act, and naming such parish. Where a declaration in ejectment by churchwardens and overseers, contained two sets of counts, one describing them by their *office*, without their *names*, and the other by their *names*, without their *office*:—Held, after verdict, the objection, if any, was cured.

EJECTMENT for a house and land in the parish of *Orleton*, in the county of *Hereford*. The house and land in question were parish property, and the ejectment was brought by the parish officers for the time being, by virtue of the statute 59 *Geo.* 3. c. 12. s. 17. The declaration contained four several demises; first, by the churchwardens and overseers of the parish of *Orleton*; second, by the overseers of the said parish; third, by certain persons (five in number), naming them, but not describing them as parish officers of *Orleton*; and, fourth, by four of the said persons mentioned in the last demise, naming but not describing them. At the trial before *Best*, J., at the last Assizes for the county of *Hereford*, the plaintiff had a verdict.

R. Winter now moved for a rule to shew cause why a nonsuit should not be entered, or why a new trial should not be granted, on the ground, that the lessors of the plaintiff had not sufficiently described the character in which they professed to sue, conformably to sec. 17. of the statute above mentioned. By that section it is enacted, "That in all actions brought in respect of lands, &c. belonging to the parish, it shall be sufficient to name the churchwardens and overseers of the poor for the time being, describing them as the churchwardens and overseers of the poor of the parish for which they shall act, and naming such parish." In this case the declaration contained two sets of counts, one *describing* the churchwardens and overseers by their *name of office*, without giving their *names*, and the other describing them by their *names* without naming their *office*. This, he contended, was insufficient, inasmuch as in the

1823.



Doe
v.
Harpur.

one they were not *named*, though *described*, and in the other they were *named* but not described, according to the requisites of the statute. But

Per Curiam.—This objection comes too late after verdict, whatever effect it might have had if urged at the trial. By the section of the statute, upon which the objection arises, the churchwardens and overseers are empowered to accept, take, and hold lands, "as a body corporate;" and therefore the description, "churchwardens and overseers of the parish," naming the parish, would be correct in point of law, without describing them by their names. Unless the objection appears on the record, it cannot be taken advantage of on motion for a new trial. This is a mere formal objection, and is cured by the verdict. No leave appears to have been given to move for a nonsuit, and as no injustice appears to have been done, we cannot grant a new trial upon a point of mere form.

Rule refused.

Hall *v.* Arnold.

Friday, April 18.



A prisoner in custody for a contempt is not entitled to the rules of the *King's Bench* prison, but where the Marshal, in consequence of a surgeon's certificate, that a prisoner in his custody for a contempt, in not paying money pursuant to the Master's allocatur, was dangerously ill, and would die if closely confined, allowed the prisoner the rules until he got better, and afterwards confined him again within the walls, the Court refused to proceed against the Marshal, by ordering him to pay the money, for the non-payment of which the prisoner was in contempt, and dismissed the application with costs.

The Marshal being called upon to shew cause why he should not pay the plaintiff two several sums of 61*l.* and 25*l.* 6*s.* the facts disclosed on affidavits were these:—An attorney of the Court had been attached for not delivering up deeds in his possession, and for not paying over the sums above-mentioned, pursuant to the Master's allocatur, and was taken on the attachment, and delivered into the custody of the Marshal. Whilst in custody he became extremely ill, and his life was despaired of. The Marshal

1823.



HALL v. ARNOLD.

consulted a surgeon, who certified that close confinement would be fatal to the prisoner's life, and acting upon this certificate the Marshal admitted his prisoner to the rules, and his health becoming amended, he was again taken back within the walls of the prison. The question now was, whether the Marshal was liable to pay the sums abovementioned in consequence of his alleged breach of duty in allowing a prisoner in custody upon an attachment to have the benefit of the rules, contrary to law.

Scarlett, for the Marshal, contended, that supposing a prisoner in custody on attachment was not entitled, strictly speaking, to the rules of the prison, still, in a case of this description, where the Marshal acted from motives of humanity, in order to save the life of his prisoner, the Court would not visit him in this summary manner, and punish him as for an escape. The Court must be satisfied that the Marshal acted from culpable motives. Here all culpability was negatived, and the rule ought to be discharged with costs.

Chitty, contrà, urged, that the Marshal had no power to grant the rules to a prisoner in custody on attachment. The prisoner in such case was in custody for punishment, and was not entitled to the same indulgence as prisoners for debt. In allowing this person to have the rules, the Marshal was clearly guilty of misconduct, and was bound to pay the sums of money for which his prisoner was detained.

PER CURIAM.—This is an application against the Marshal, suggesting that in violation of his duty he has allowed the benefit of the rules to a prisoner to whom by law he ought not to grant such an indulgence. It may be true, that generally speaking, persons in custody for a contempt, are not entitled to the rules of the King's Bench prison; but

1823.



HALL
v.
ARNOLD.

upon what ground was this person allowed the rules? The Marshal is informed that his prisoner is in an extremely dangerous state of health, and that close confinement may be fatal to his life. In the opinion of the surgeon, who sends his certificate, the prisoner is likely to die if his close confinement is continued. Acting upon this suggestion, the Marshal allows the party to take up his residence in a lodging within the rules, where he is as much in confinement, for the purpose of safe custody, as if he were within the walls of the prison, and after a short time, he is brought back to his former custody. Under such circumstances we think we are not bound to punish the Marshal as for misconduct. The question then remains, whether the Marshal is to pay the costs of this application, or the person who brought him here to shew cause against this rule. It is stated that this application was made to the Court without any previous application to the Marshal. If the party had first applied to the Marshal, he would have been informed of the cause which induced him to allow the benefit of the rules to his prisoner, and then he would have found that there was no ground for this application, but as he has thought fit to bring the Marshal here without cause, we think he ought to pay the costs of the application.

Rule discharged, with costs.

1823.

Friday, *April* 18.

TRUSCOTT and Others *v.* MARSH and Others.

A. takes from the *Board of Works* a piece of ground in *Westminster* for the erection of galleries at the King's coronation, and underlets part of it to *B.* on the same terms. The rent is paid by *B.* to *A.*, who deposits it in the hands of his bankers, with a condition, that if the coronation does not take place, and the rent is in consequence remitted by the *Board of Works*, the money is to be returned to *B.* The coronation does take place, but in consequence of the speculation being unprofitable to the parties, the Crown remits the whole rent to *A.*, who refuses to return the money paid him by *B.*:—Held, that *B.* might maintain assumpsit for money had and received against the bankers as stake-holders.

ASSUMPSIT for money had and received by the defendants as stake-holders. At the trial before *Abbott*, C.J., at the *Middlesex* adjourned Sittings after last *Hilary* Term, the case was this:—Two persons named *Brindley*, having hired from the Board of Works a piece of ground in *Westminster* for the erection of galleries, at the coronation of his present Majesty, underlet a portion of the ground to the plaintiffs for the sum of 455*l.* which was paid by the plaintiffs to Messrs. *Brindley*, and by them deposited in the hands of the defendants, their bankers, with the following memorandum:—"*London, July* 6th, 1821. We, the undersigned, do place in your hands the sum of 455*l.*, to be paid over to the underwritten *John Truscott* and Co., in case the proposed coronation does not take place, and in consequence that the Board of Works do not charge the underwritten *J.* and *B. Brindley* and Co. with the rent agreed by them to be paid for the scite of the scaffolding, *Palace Yard,* the ground on a part of which has been taken from *Brindley* and Co. by *Truscott* and Co. at that rate. But in case of such a rent not being remitted to *Brindley* and Co., then the said sum of 455*l.* to be paid over to the account of *James Burton.* Signed *J.* and *T. Brindley.* To Messrs. *Marsh* and Co." The coronation having taken place, and the parties being out of pocket by the speculation, Messrs. *Brindley* petitioned the Lords of the Treasury to remit the rent, and the whole rent was in point of fact remitted to them, including that portion of ground which they had underlet to the plaintiffs. The plaintiffs in consequence applied to Messrs. *Brindley* to return them the money deposited with the defendants, but the application was rejected, and the present action was brought. It was submitted, on the part of the defendants, that the action could not be maintained,

1823.

TRUSCOTT v. MARSH.

because the only condition which was to defeat Messrs. *Brindley*'s right to the rent, was, that of the coronation not taking place, and as that event had happened, the plaintiffs had no claim to recover the money back. The Lord Chief Justice over-ruled the objection, and the plaintiffs had a verdict, with leave to the defendants to move to enter a nonsuit.

F. Pollock now moved accordingly, and renewed the objection, contending, that at any rate the form of action had been misconceived, because, as the coronation had taken place, the only contingency upon which the money could become payable to the plaintiffs had happened, and therefore it could not possibly be considered as money had and received to their use. But,

PER CURIAM.—The form of action is perfectly consistent with the facts of the case, and the verdict found is the only one by which justice could be done between the parties. The whole piece of ground is let to *Brindley* and *Co.* by the Crown, with an understanding that the plaintiffs are to have a part of it upon precisely the same terms. *Brindley* and *Co.* were then in the situation of trustees pro tanto for the plaintiffs, and when the Crown remitted the rent to them, it was in effect remitted to the plaintiffs also. If *Brindley* and *Co.* were to retain this money, they would commit a fraud upon the Crown, because, if it is payable to any person, it is payable to the Crown. This money was clearly had and received by the defendants for the plaintiffs use. One of the conditions is, that of the rent not being remitted. In that case the money is to belong to *Brindley* and *Co.*; in the other, it is to belong to the plaintiffs. The rent was remitted; from that moment the money became the property of the plaintiffs, in the hands of the defendants, and may be recovered from them in this form of action.

Rule refused.

1823.

Saturday, April 19.

Ancaster *v.* Milling.

Tenant from year to year being desirous of letting his house for a quarter, quits and leaves it locked up, with authority to his landlord to let it during his absence, if opportunity should offer, and for that purpose leaves the key with a neighbour. An opportunity of letting offers, but the person who has the key having absconded, the landlord enters by placing a ladder against the house, and raising the first floor window, and, after shewing the house, leaves it in the same state as before. The house is afterwards entered by persons unknown, and some of the tenant's furniture and wearing apparel is stolen. Trespass is brought against the landlord for breaking and entering the house, and leaving it insecure, per quod tenant's furniture and wearing apparel were stolen:—*Held*, that a plea of leave and licence was no answer to the action.

TRESPASS. The declaration stated, that the plaintiff being possessed of a certain dwelling-house, in which were some furniture, and a quantity of wearing apparel, defendant broke and entered the same, and quitted and left it in so insecure a state, that by reason thereof certain persons, to the plaintiff unknown, entered and robbed the house of divers articles of the said furniture and wearing apparel. Plea, first, the general issue, Not Guilty; and, second, leave and licence, and issue thereon. At the trial before *Park*, J., at the last Assizes for *Lincolnshire*, it appeared in evidence that the defendant was landlord of the house in question, and had let the same to the plaintiff as tenant from year to year. The plaintiff was commander of a vessel trading from *Lincoln* to *London*. Three months before the end of the year the plaintiff quitted the house, leaving it locked up; but being desirous of letting the house for the remainder of the year, he communicated his wishes to the defendant, and requested, that if an opportunity offered, he would let it during his absence on a voyage to *London*. For this purpose he left the key of the house with a neighbour, and informed the defendant of that circumstance, and told him that he might have it upon application when wanted. During the plaintiff's absence, an opportunity offered of letting the house, and in order that the proposed tenant might have a view, the defendant applied to have the key, but found that the person in whose hands it had been left, had absconded. The defendant, finding that he had no means of entering the house in the

ordinary way, applied to a blacksmith in the neighbourhood, and it was resolved, that the best mode of entering was by a ladder, placed against the first-floor window. Accordingly, a ladder was procured, and an entrance gained in the manner suggested, by raising up the window. After the house was thus shewn to the proposed tenant, the parties left it in the same state in which they found it. There were no fastenings to the window. Some nights afterwards the house was entered, as was supposed, in the same way, by some person or persons unknown, and several articles of the plaintiff's furniture and wearing apparel were stolen; to recover the value of which this action was brought. It was contended, on the part of the defendant, that upon these facts the plea of leave and licence was a complete answer to the action; but the learned Judge was of opinion, that the licence given did not justify an entrance in the manner proved in evidence, and after charging the Jury that the evidence, if believed, was sufficient to establish the trespass complained of, the Jury found their verdict for the plaintiff, damages 20*l*.

Vaughan, Serjt., now moved for a rule to shew cause why the verdict should not be aside, and a new trial granted, on the ground, first, of misdirection on the part of the learned Judge; and, second, that the verdict was against evidence. He contended, that under the plea of licence, the entry by the defendant in the manner proved was fully justified, both in law and under the circumstances of the case; the permission to enter was not limited by any restrictions or conditions, and for such a purpose an entry by a window was quite as legal and justifiable as the more usual mode of entering by the door.

Per Curiam.—The licence pleaded could not warrant such a mode of entry as that proved in evidence. The act of raising a ladder, and opening the window of an un-

1823.

ANCASTER v. MILLING.

protected house, was an invitation to evil-disposed persons to take advantage of the same means to enter for dishonest purposes. That result in fact followed, and for the injury sustained the defendant is clearly liable. The direction of the learned Judge was therefore perfectly correct, and there is no ground for disturbing the verdict.

Rule refused.

Saturday, April 19.

DOE, d. BIGGS *v.* WHITE and Others.

By marriage-settlement, husband has the wife's estate for life, with power to grant leases for twenty-one years, but no longer. In breach of the power he grants a lease to *A.* for ninety-nine years, determinable upon lives. Wife survives him, and conveys the fee to *B.*; and in the conveyance is recited, the lease to *A.*, who is recognized as then being tenant in possession of the estate, at the yearly rent reserved. *B.* brings ejectment against the assignees of the lease:—Held, that the lease being void, and the recital being only matter of description, no demand of possession was necessary to sustain the action.

EJECTMENT to recover the possession of lands and premises, situate in the parish of *Godford St. Peter*, in the county of *Wilts*. The facts of the case were these:—The lessor of the plaintiff claimed title to the premises under a deed of conveyance, bearing date 17th *November*, 1818, executed to him by a Mrs. *Parry*, who had the fee. The estate had formerly belonged to a Mr. *Saunders*, the first husband of Mrs. *Parry*, who at his death devised it to her in fee. Upon her second marriage, the estate was granted by deed of marriage settlement to *Parry* for his life, with power to grant leases upon certain conditions specified in the deed, one of which was, that no lease should be granted upon lives, or for a longer term than twenty-one years. On 31st *December*, 1793, *Parry* granted a lease to the Rev. *J. Dampier* for a term of ninety-nine years, determinable upon lives, which, in 1805, was assigned by him to certain other persons, and subsequently by them to the defendants. *Parry* died in 1814, and in 1818, Mrs. *Parry* conveyed the whole estate to the lessor of the plaintiff for a valuable consideration. At the trial before *Hullock*, B., at the last Assizes for *Wiltshire*, it was objected, that as no demand of possession had been served before the action was brought, the plaintiff must be nonsuited, but the learned



Judge over-ruled the objection, and the plaintiff had a verdict, with liberty to the defendants to move to enter a nonsuit.

Pell, Serjt., now moved accordingly, and contended, that the objection was fatal to the action. The deed under which the lessor of the plaintiff claimed title, expressly recognised the tenancy of the defendants, for it described the property as being then in their possession at a certain yearly rent. It was quite clear, therefore, that Mrs. *Parry* could not have maintained ejectment for the premises without making a previous demand of possession, and consequently the lessor of the plaintiff, who now represented her, and stood precisely in the same situation as she had previously stood, was bound by the same rule, and ought to have made a demand. The deed under which he claims, treats the lease, of which the defendants are the assignees, as a valid and existing lease, and he cannot go out of the language of that deed, and treat that lease as a nullity.

Per Curiam.—The supposed recognition of the lease which the defendants hold, in the conveyance from Mrs. *Parry* to Mr. *Biggs*, does not exist in the degree contended for, nor carry with it the effect attributed to it. It is no recognition of the defendants as the tenants in possession, which it must be in order to have any such effect. It is mere matter of description, a mere mode of specifically pointing out these particular lands, and is not in any degree binding either upon Mrs. *Parry*, or the lessor of the plaintiff. Nor is it possible that it should be binding in law, even if the words had been more clear and unequivocal. The lease which the defendants hold is a nullity; it was made in direct violation of the power, and is absolutely void. The defendants, therefore, are not tenants, they have no title to the possession, and consequently no right to a demand of possession.

Rule refused.

1823.

Saturday, April 19.

GOODTITLE, d. The MASTER and FELLOWS of LINCOLN COLLEGE *v.* LEE, Clerk.

A spiritual person, who in virtue of his office of chaplain of a college, holds a curacy with a dwelling attached thereto, and ceasing to hold the office of chaplain, retains possession of the dwelling, is not a curate within the meaning of 57 *Geo.* 3. c. 99. s. 67, and may be evicted by notice to quit forthwith, and is not entitled to the three months' notice required to be given by that statute, with the consent of the bishop.

EJECTMENT to recover the possession of the parish church and church-yard of *Long Coombe*, in the county of *Oxford*, together with a dwelling-house and premises in the same parish. At the trial before *Bosanquet*, Serjt., at the last Assizes for *Oxfordshire*, it appeared that the defendant had been by *Lincoln College* appointed chaplain of *Long Coombe*, and became possessed of the church and other premises mentioned in the declaration, in virtue of his appointment; but having ceased to hold the office, and being required to give up the curacy and dwelling-house, he declined doing so, and the present action was brought. The notice to quit was dated the 1st of *December*, 1820, and was "to quit *forthwith*." The lessors of the plaintiff had a verdict generally, with liberty to the defendant to move to confine the verdict to the church and church-yard only.

Jervis now moved accordingly, and grounded his application upon the statute 57 *Geo.* 3. *c.* 99. s. 67, which provides, "that it shall not be lawful for the rector or vicar, or other person, holding a benefice, in any case in which the parsonage or vicarage, or usual house of residence, shall have been assigned to the curate for a residence, to dispossess such curate, or take possession thereof, until the permission of the bishop shall have been given in writing for that purpose, and three months' notice of such his intention to the curate." Now, in this case, the only notice given to the defendant was to quit forthwith; there was no three months' notice, nor any permission of the bishop given; and therefore as the defendant was a resident curate, it was clear, upon the face of this section, that the present action could not be supported with reference to the dwelling-house.

1823.

GOODTITLE v. LEE.

PER CURIAM.—The statute is confined to cases where the curacy continues up to the time of giving the notice to quit. Here the curacy, if it can be so called, had determined from the moment when the defendant ceased to fill the office of chaplain, and consequently he was not, when the notice was given, a resident curate within the protection of the act. But there is a still stronger ground against this application; for the defendant was never a curate within the language and meaning of the legislature; he was only a chaplain, which is a perfectly distinct character, and not included in the words of the clause, which applies only to a curate who holds under a spiritual rector or vicar.

Rule refused.

COCKER *v.* CROMPTON.

Tuesday, April 22.

Where plaintiff in trespass quare clausum fregit begins by naming his own close, it is not necessary for him to new assign after a plea of liberum tenementum. Therefore, in trespass for breaking and entering a certain close of plaintiff called the *Homeyard*, and plea that the said close called the *Homeyard* is the soil and freehold of defendant, and issue thereon, which is found for the plaintiff:—Held, that a new assignment was unnecessary.

TRESPASS for breaking and entering "a certain close of the plaintiff, called the *Homeyard*, in the parish of *Prestwich cum Oldham*, in the county of *Lancaster*." Plea, that the said close called the *Homeyard*, in the said parish, in which, &c. is the soil and freehold of the defendant. Issue upon this plea. At the trial before *Holroyd*, J., at the last Assizes for the county of *Lancaster*, the plaintiff having merely proved his possession of *a close called the Homeyard*, in the parish of *Prestwich cum Oldham*, and an act of trespass upon it by the defendant, it was objected that as the defendant had put upon the record a plea which rendered it doubtful to which party the close called the *Homeyard* really belonged, it was the duty of the plaintiff to have new assigned instead of taking issue on the plea,

1823.
COCKER v. CROMPTON.

and so to have identified *his* close called the *Homeyard* as the particular close in which the trespass was committed; whereas, upon the present state of the record and the evidence, it was quite uncertain whether there were not two closes called the *Homeyard*, in the same parish, and upon which of them the defendant had entered. The learned Judge, however, being of opinion that no new assignment was necessary, the plaintiff had a verdict, with liberty for the defendant to move to enter a nonsuit.

Cross, Serjt., now moved accordingly, and relied upon the objection raised at the trial as fatal to the plaintiff's case. It was clearly the duty of the plaintiff to identify his own close as that in which the trespass had been committed, and to remove all uncertainty and doubt as to his own right of action. This could only be done in the state of this record by new assigning, and that course he ought to have adopted. Some of the old cases are indeed opposed to this doctrine, *Dyer*, 23 b. and *Rickman* v. *Coxe* (a); but more modern decisions have laid down the rule now contended for, and seem in principle fully to govern the present case. He cited *Goodright* v. *Rich* (b), where *Lawrence*, J., said, "notwithstanding the case in *Dyer*, according to the modern practice, if the defendant plead liberum tenementum, the plaintiff is driven to a new assignment, in which he must specify the close," and *Hawke* v. *Bacon* (c).

ABBOTT, C. J.—I take it to be quite clear, that where the plaintiff in an action of trespass begins by naming his own close, it is not necessary for him to new assign after a plea of liberum tenementum; but that where no name is in the first instance given, he is driven by such a plea to a new assignment. When the plaintiff in this case has proved a trespass in his own close of a particular name, it is no answer for the defendant to say, that he has a close of the

(a) Cro. Jac. 594. (b) 7 T. R. 327. (c) 2 Taunt. 156.

same name. In such an issue the burthen of proof is on the defendant; for his plea "that *the said close*, &c. is his soil and freehold," is disproved by the plaintiff's evidence, and is in effect an admission of the truth of the plaintiff's averment. I am therefore of opinion, that there is no ground for the present application.

Bayley, J.—In the old forms of pleading it was not usual for the plaintiff to name the locus in quo specifically, and therefore it was competent to the defendant to give it a particular name in his plea, and so to render it necessary for the plaintiff to identify it as his own, by a new assignment. But where the plaintiff begins by naming the close, that necessity does not arise. If the defendant wished to drive the plaintiff to a new assignment, he should have set out the close with the abuttals and boundaries, and not have confined his specification of it to name alone.

Holroyd, J.—The issue in the cause was, whether the close in which the plaintiff alleged the trespass to have been committed, was the freehold of the defendant or not. There was no issue as to any other close. The plaintiff proved a trespass in *his* close called the *Homeyard*, and the defendant cannot answer that evidence by merely pleading that he did the act complained of in *his* close; he must prove that it is his close, and how the trespass was justifiable. This he has not done, and therefore the issue is satisfactorily proved for the plaintiff. The rule of pleading, as now laid down by the Court, will, I believe, be found to be warranted by a rule of Court, of the date of 1653, No. 12; and in *Rastall's* Entries, under the title of "Close."

Best, J.—The only object of a new assignment is to render the issue to be tried, more definite and precise. It would have had no such effect in the present case even if

1823.

COCKER v. CROMPTON.

it had been pleaded, and it was besides perfectly unnecessary; for the issue upon the plea was as definite and precise as any thing can possibly be. That issue has been found for the plaintiff, and in my opinion very correctly.

Rule refused.

Tuesday, April 22.

MITCHELL v. MITCHINHAM.

Habeas corpus cum causâ does not lie to remove the proceedings from an inferior jurisdiction into this Court, unless it appears that the defendant is actually or virtually in the custody of the Court below.

IN this case the defendant had been sued by plaint in the Borough Court of *Newcastle-upon-Tyne,* and after appearance entered, took out a habeas corpus cum causâ, to remove the proceedings into this Court. Last Term a rule nisi was obtained for quashing the writ of habeas corpus for irregularity, with costs; and on shewing cause now, the question was, whether a writ of habeas corpus cum causâ would lie to remove proceedings from an inferior jurisdiction into this Court, unless the process was by capias, or other proceedings against the body of the party. It was conceded, that in this case the proceedings were only by plaint, which required no more than a common appearance.

Chitty shewed cause against the rule, and contended, that the constant practice had been to remove by habeas corpus the proceedings of an inferior Court, whether the body of the party was actually or virtually in the custody of the Court below. It had never been expressly decided that the habeas corpus cum causâ did not lie, unless the proceedings were by attachment or other process against the body. With respect to the writ of certiorari, it is laid down generally in *Tidd's Practice,* that that writ lies for the removal of all causes from inferior Courts, whether the proceeding be by capias or otherwise. No good reason could be assigned why the same practice should not prevail with respect to the

writ of habeas corpus. In *Goodright* v. *Dring* (*a*), the Court last Term held, that to remove an ejectment from an inferior Court, the certiorari was the proper writ, but no distinction was taken as to whether the proceedings were or were not against the body of the party. He also referred to *Cox* v. *Hart* (*b*).

Tindal, contrà, was stopped by the Court.

Per Curiam.—This is not a case in which the habeas corpus cum causâ will lie. The proceeding is by plaint, and not by attachment, or other process against the body. The habeas corpus cannot issue, unless it appears that the inferior Court is either virtually or actually in possession of the body. It is said, that there is no express authority for this, but we need only the authority of principle, which is, that the writ of habeas corpus must be directed to some Court having the body, either actually, or in the eye of the law, in its custody. Here the party is not in custody really or virtually; the process only requires an appearance, which may be done by attorney. Bailable process is not requisite to entitle the party to the habeas corpus; the distinction applies to cases where the language of the process requires the body to be taken, although common bail be sufficient. When common bail is filed, still the party in the eye of the law is in custody, and in such case the habeas corpus may issue. In this case the process is not against the body, and therefore the habeas corpus cannot lie.

Rule absolute.

(*a*) Ante, 407.

(*b*) 2 Burr. 758.

1823.

Tuesday, April 22.

The KING *v.* The BAILIFFS and BURGESSES of the BOROUGH of ILCHESTER.

The bailiffs and burgesses of an ancient borough had been, time immemorially, lords of the manor, and owners of the Guildhall, within the borough, and by a charter of *Phil. & Mar.*, power was granted to them to hold manor courts in the Guildhall twice in every year, as of ancient time, and until 1807 such courts had been time immemorially held. In 1807 commissioners under an inclosure act, awarded to Lord *H.*, all the said manor, with the rights, members, courts, view of frankpledge, *excepting to the bailiffs and burgesses the Guildhall, &c.*, and until 1821 Lord *H.* held courts in the Guildhall, and being then obstructed; *Semble*, That mandamus would lie to the bailiffs and burgesses to compel them to allow the manor courts to be held in the Guildhall.

THIS was a rule, calling upon the defendants to shew cause why a writ of mandamus should not issue, commanding them to permit and suffer Sir *W. Talmash*, Bart. commonly called Lord *Huntingtower*, lord of the manor of *Ilchester*, and his steward of the said manor, to hold courts-leet, and views of frankpledge for the said manor, within the Guildhall of the said Borough. It appeared from the affidavits, that the Borough of *Ilchester* was an ancient Borough, and that the bailiffs and burgesses thereof had been, from time immemorial, lords of the manor, and owners of the Guildhall. That by a charter of 3 & 4 *Phil.* & *Mary*, power was granted to them to hold views of frankpledge in the Guildhall twice in every year, " as of ancient time." That a Court-leet and view of frankpledge had from time immemorial, down to the year 1807, been held in the Guildhall by the bailiffs and burgesses as lords of the manor. That in the year 1807, the commissioners, under an act, entitled " An act for inclosing lands in the parish of *Ilchester*," &c. awarded to Lord *Huntingtower* " all the said manor, with the rights, members, courts, view of frankpledge," &c. " excepting to the bailiffs and burgesses, the Guildhall," &c. That Lord *Huntingtower* had ever since that time, continued lord of the manor, and had as such held his Court-leet in the Guildhall regularly down to the year 1821, when he was obstructed in so doing, and in consequence of that obstruction, the present rule had been applied for.

1823.

The KING v. The BOROUGH of ILCHESTER.

Adam shewed cause. There is no ground whatever for the present application. By the common law, Courts-leet may be held in any place which may be thought convenient, and there is no right in the inhabitants of this Borough to prescribe for any particular place of holding the Court, unless the charter expressly limits it to the place prescribed for. The charter in the present case does no such thing. In point of fact the Court has, certainly, during a long series of years, been held in the Guildhall, but that has been done merely upon the ground of convenience, and not at all as a matter of necessity or right. Since the Inclosure Act, and the award of the commissioners thereupon, it has been found more convenient to hold the Court elsewhere; but no delay or denial of justice has been produced, no injury has been done to the suitors, nor can any good reason be assigned why the Court should be held in the Guildhall rather than in any other place. This, therefore, is not a case in which the Court will interfere by mandamus. There is no precedent to be found in which the writ has been granted under similar circumstances. It is true that the charter, which granted the Court-leet, appointed or rather empowered it to be held in the Guildhall; but that was only a privilege, not a condition, and when change of circumstances, and lapse of time have made it convenient, that privilege may be waived, and the place of holding changed. This principle seems deducible from the case of *Rex* v. *The Mayor of Wigan* (a), where *Denison*, J., declares, that the holding a Court-leet in any other place than where it has been usually holden, is not a sufficient ground for a mandamus, and upon that ground the writ was refused. Nor does the case of *Rex* v. *The Corporation of Grantham* (b), which was cited when this rule was obtained, go to defeat the present argument, because there the mandamus was granted upon the ground of a prescriptive right in the lord

(a) 1 Wils. 76.

(b) 2 Sir W. Bl. 716.

1823.

The KING
v.
The BOROUGH of ILCHESTER.

of the manor to hold the Court at a particular time and place, which he had been obstructed in doing.

Gaselee and *D. F. Jones*, in support of the rule, were stopped by the Court.

PER CURIAM.—The case in *Wilson* does not govern the present. The facts there, went no further, than to shew that the Court-leet had been "usually holden" in the Town-hall; there was no regular series of holdings there. But here the Court has been held in the Guildhall from the period when the Court itself was constituted, down to a very recent moment, the bailiffs being prescriptively lords of the manor and owners of the Guildhall. This case, therefore, ranges itself more decidedly within the principle acted upon in the *Grantham* case, and if the Guildhall, as the place of holding the Court, was originally incident to the Court itself, any subsequent exception must be void. There are two questions, however, now raised, which may be much more satisfactorily considered upon the return to the writ of mandamus than they can upon the materials at present before the Court; first, whether it was parcel of the original grant that the Court-leet should be held in the Guildhall; and if that be so, then, second, whether it can be legally held any where else. Without, therefore, deciding this case one way or other upon the authorities cited, we think it more satisfactory for the full investigation of the question to grant the writ.

Rule absolute.

The KING *v.* WILLIAM BELLAMY.

Wednesday, April 23.

A conviction on the statute 5 *Ann.* c. 14. s. 4. for keeping and using a gun to kill and destroy game without being qualified, must be made within three lunar months after the offence is committed.

CONVICTION on the stat. 5 *Ann.* c. 14, for keeping and using a gun to kill and destroy game. The conviction (which was returned into this Court by certiorari) set forth, that on the 8th *November*, 2 *Geo.* 4., *R. Roberts*, D. D., in his proper person, came before *C. E. J.*, Clerk, a Justice of Peace, &c. and gave him to understand, "that one *William Bellamy*, of the parish of *Stoke Doyle*, in the county of *Northampton*, grazier, within three months now last past, to wit, on the 1st *September*, 2 *Geo.* 4., the said *William Bellamy* being a person not having then lands, &c. (negativing the several qualifications for killing game mentioned in the statute) did keep and use a gun, being an engine to kill and destroy game, against the form of the statute." The conviction then set forth a summons of the defendant on the 8th *November*, and his appearance on the 6th *December*, when he did not deny the fact of his keeping and using a gun, but pleaded a qualification to kill game, whereupon the Justice proceeded to examine a witness on the part of the informer, who proved the offence, in the manner therein stated, to have been committed on the 1st *September*, 2 *Geo.* 4., and in conclusion, the Justice, after stating that the defendant had not shewn any sufficient cause why he should not be convicted, adjudged him to pay the penalty of 5*l.* in the usual form. The objection to the conviction was, that it had not taken place within three months next after the time of committing the offence, conformably to the statute 5 *Ann.* c. 14.

Adams in support of the conviction. This conviction being founded on the sec. 4 of 5 *Ann.* c. 14, is in time, in-

asmuch as no time is mentioned in that section, within which the conviction shall take place. The second section of the statute imposes a penalty of 5*l.* upon any higler, &c. for having in his possession, or buying or selling, or offering to sell, game, and directs that the penalty shall be levied by sale and distress of the offender's goods, and for want of distress, directs, that the offender shall, for the first offence, be committed to the House of Correction for three months; and for the second, for four months, "provided that such conviction be made within three months after such offence committed." It cannot be denied that a conviction under this section must take place within three months. The question is, whether the same limitation is to be applied to the conviction for offences committed within the 4th section. By that clause it is enacted, "that if any person, not qualified by law, shall keep any sporting dogs or engines to destroy game, and shall be convicted by the Justices where the offence is committed *as aforesaid*, the person *so convicted*, shall forfeit the sum of 5*l.* the same to be levied by distress and sale of the offender's goods, by warrant under the hand and seal of the Justice before whom such person shall be convicted *as aforesaid*. If the words "as aforesaid," thus used in the 4th section, are to be construed as having reference to the manner and time of conviction mentioned in the 2d section, certainly this conviction is out of time. But such a construction seems not to be warranted, because the words "as aforesaid," do not necessarily refer to the time of conviction mentioned in the preceding section, and may as well be construed to refer to any other matter or thing mentioned in the same clause. The 4th section, taken by itself, expresses no limitation of time within which the conviction shall take place, nor indeed does it contain any direct words of reference to the preceding clause, which is expressly directed against higlers, and cannot be extended by any construction to unqualified persons keeping sporting dogs or engines to destroy game. The case of

Rex v. *Tolley* (a), though seemingly an authority in favour of the objection in this case, cannot avail the present defendant, because that case was decided with reference to the 9 *Ann.* c. 25, which recites and makes perpetual the 5 *Ann.* c. 14, and expressly provides, that the forfeitures incurred by the later act shall be recovered by such means, and in such manner and form, *and within such time*, as are prescribed by the recited act, respecting higlers. The defendant in that case was convicted upon the 5 *Ann.* c. 14, and, being a game-keeper, rested his defence upon the 9 *Ann.* c. 25, but as there are express words of reference in the latter act to the time mentioned in the 2d section of the former, within which the conviction shall take place, the Court very properly decided that the conviction was out of time, not having taken place within the three months mentioned in that section. Here, however, the words of reference contained in the 4th section by no means certainly refer to the 2d section. Logically they refer to matters mentioned in the 4th section, namely, convicted "before one Justice," "upon the view of the Justice," or "upon the oath of one or more credible witness or witnesses;" and the Court cannot, by any forced construction, tie those words down to any particular provision in the preceding clause, which is expressly applicable to a distinct class of offences, still less to the provision as to the time within which the conviction shall take place. This interpretation derives additional weight by reference to the 9 *Ann.* c. 25, which imposes a penalty upon a game-keeper killing game, who is not duly certificated, because by the express words of reference in that statute to the provisions of the 5 *Ann.* c. 14, as to the mode of recovering the penalties, and the time within which the conviction shall take place, a game-keeper not duly certificated must be convicted within three months, but if he be not a game-keeper, the inference is, that under that statute, the

(a) 3 East, 466.

1823.

The King v. Bellamy.

conviction might take place at any time. If this defendant had been proceeded against under the 9 *Ann.* and not being a game-keeper, this conviction would be in time. That statute applies solely to persons who are game-keepers not duly certificated, and therefore as to all other persons there is no limitation of time within which the conviction shall take place. Referring, therefore, to the reasonable construction of both statutes, this conviction is not restrained by the limitation as to time, by s. 2. of 5 *Ann.* c. 14, nor by the 9 *Ann.* c. 25, and judgment must be given for the Crown.

Denman, C. S. contrà, was stopped by the Court.

Abbott, C. J.—I am of opinion that the conviction before a Justice of the Peace of an unqualified person for using a gun for the destruction of game, must take place within three lunar months, next after the offence has been committed. The conviction now before us, did not take place until a period of three months had elapsed, and therefore it must be quashed. It has been more than once observed by the Court, that the language of acts of parliament is not to be examined with a critical eye, but according to its plain and obvious meaning. If we can find expressions in a statute capable of an intelligible explanation, it is our duty to give effect to them according to the obvious intention of the legislature, and not according to a critical and literal interpretation. Looking to the language of the 2d section of 5 *Ann.* c. 14, explained as it is by the language of the 4th, I think it was the obvious intention of the legislature, that the conviction, in all cases under that act, should take place within three months next after the offence was committed. The 2d section enacts, "that if any higler, &c. shall have in his possession, or shall buy, sell, or offer to sell, any hare, &c., and shall be thereof convicted, he shall forfeit for every hare, &c. the

1823.



The KING v. BELLAMY.

sum of five pounds, &c. *provided that such conviction be made within three months after such offence committed.*" The 3d section only provides for the encouragement of destroyers of game, to make discoveries against persons who buy or sell game; the 4th section enacts, "that if any person or persons, not qualified by the laws of this realm so to do, shall keep, or use, any greyhounds, &c., tunnells, or any other engines to kill and destroy game, and shall be thereof convicted, upon the oath of one or two credible witnesses, by the Justice or Justices of the Peace, where such offence is committed, *as aforesaid,* the person or persons so convicted shall forfeit the sum of five pounds." The words "as aforesaid," clearly must refer to the time within which the conviction is to take place, because the offence cannot be committed before the Justices of the Peace. We must, therefore, understand these words "if any person shall keep, &c., and be therefore convicted *as aforesaid,*" as having reference to the 2d section, which mentions the time within which the conviction is to take place, for nothing is said in the 4th as to the time of the conviction, except by reference to the 2d section. Then comes the 9th *Ann.* c. 25. s. 1, which relates to the power of appointing game-keepers, and enacts, "that no lord or lady of a manor shall appoint above one person to be a game-keeper, and that the name of such game-keeper shall be entered with the clerk of the peace; and in case any other game-keeper whose name shall not be so entered, who shall not be otherwise qualified by the laws to kill game, shall presume to kill any hare, &c.; or, if any game-keeper, or other person whatsoever, not being qualified, in his own right to kill game, shall sell, or expose to sale, any hare, &c., the offender shall incur such forfeitures as are inflicted by 5 *Ann.* c. 14, upon higlers, &c. for buying or selling game, such forfeitures to be recovered by such means, and in such manner and form, *and within such time,* and to such uses *as are prescribed by the*

1823.

The KING v. BELLAMY.

said act." Now, the time which is mentioned, in the 2d section of 5 *Ann.* c. 14, seems manifestly to shew that the legislature considered the 4th section which imposes the penalty on unqualified persons killing game, as limiting the time of conviction, in like manner as it was limited in the previous section against carriers and higlers. Unless this construction is put upon the statute, there would be this anomaly, namely, that the higler must be convicted of selling within three months, but the unqualified person offending against the 4th section, might be convicted at any time after the expiration of that period, unless he was a game-keeper not duly certificated according to the 9 *Ann.* c. 25. There would be great inconvenience in putting such a construction upon the statute; but that inconvenience is avoided by holding that the 5 *Ann.* c. 14. prescribes the limitation of three months to all the offences on which penalties are imposed by that statute.

BAYLEY, J.—I am entirely of the same opinion. In the case of *Rex* v. *Tolley* (a), the question arose upon the same section as the question in this case arises, and I think that case was rightly decided, and is an authority in point, on the present occasion. The 2d section of the act declares, that if the party is convicted before a Justice of the Peace within three months after the offence is committed, he shall be liable to the five pounds penalty, prescribed by that clause, and if he shall not be able to pay it, by distress and sale of his goods, he shall be liable to be committed to the House of Correction for three months, and for every other offence for the space of four months. Then comes the 4th section, which enacts, that the offender under that section, who shall be convicted "*as aforesaid,*" shall pay a penalty of five pounds, the same to be levied by distress and sale of the offender's goods, by warrant under the hand and seal of the Justice before whom he shall be convicted

(a) 3 East, 467.

1823.

The KING v. BELLAMY.

"*as aforesaid*," and for want of such distress he shall be sent to the House of Correction for three months, and for every other offence, four months. Now here the words "as aforesaid" are repeated twice, and they clearly can have no meaning unless they have reference to the time within which the conviction is to take place, as mentioned in the 2d section. The words "if any person convicted as aforesaid," cannot apply to the time when the offence is committed, but to the time when the party shall be convicted. In a subsequent part of the same clause "as aforesaid" occurs again, as connected with the word "convicted," and therefore, in grammatical construction, that section must have reference to the time mentioned in the previous section. The words "convicted as aforesaid" must be understood to comprehend all the limitations and restrictions mentioned in the 2d section, which, amongst other things, provides that the conviction shall take place within three months. This conviction has not taken place within that period, and consequently it must be quashed.

HOLROYD, J.—I also think that this conviction not having taken place within three months, cannot be supported. It appears to me, that the case of *Rex* v. *Tolley* was rightly decided; but, I do not think that case is conclusive of the present. In the present case, unless, the 4th section of 5 *Ann.* c. 14, has reference to the 2d section by force of the words "convicted as aforesaid," it can have no application at all, but I think, in fair grammatical construction, the time mentioned in the 2d, within which the conviction is to take place, must govern the construction of the 4th section.

BEST, J.—I am of the same opinion. It is most important for a defendant that informations upon this statute should be prosecuted within three months, and that the conviction should take place immediately after the offence

1823.
The King v. Bellamy.

is supposed to have been committed, for if the prosecution is brought forward at a later period, his attention may not be called to the precise time when the offence is charged to have been committed, so as to enable him to make that defence which he would be in a situation to make if there had been a more early prosecution. If I had not the sanction of a decided authority, and if even this were a matter of doubt, unless I were restricted by express words, I should have no difficulty in saying that this conviction, in order to render it legal, should have taken place within three months. Looking to the words of the statute 5 *Anne*, I have no doubt whatever that the conviction must take place within three months. The words "as aforesaid" in the 4th section, have no intelligible meaning, unless they refer to the 2d section. If they have reference to that section, then they must mean the time "aforesaid," which is three months. According to the 9 *Anne*, which expressly refers to the 5 *Ann.* c. 14. s. 2, it would be impossible for us to come to the conclusion, that a game-keeper, not properly certificated, might be convicted within three months, but that any other person, not a game-keeper, might be convicted at any time. But all doubt in this case is removed by the decision of *Rex* v. *Tolley*, in which, though the defence was not the same, yet the decision of the Court was in favor of the defendant upon this very point. The 9 *Anne*, is an exposition of the 5th *Anne*, and the Court, in that case said, that that statute got rid of all doubt on the subject, and shewed that the conviction must be within three months after the offence committed. That decision I think is perfectly consistent with the intention of the legislature, and is an authority to justify us in giving judgment for this defendant.

Judgment for the defendant.

The KING *v.* The BIRMINGHAM GAS LIGHT and COKE COMPANY.

Wednesday, April 23.

The profits arising from the sale of gas, manufactured from coal, and conveyed through pipes and trunks under the pavement, for the purpose of lighting a town, are not rateable to the relief of the poor, under the 43 *Eliz.* c. 2.

BY a rate for the relief of the poor of the parish of *Birmingham*, in the county of *Warwick*, "The *Birmingham* Gas Light and Coke Company," were assessed in respect of their premises and gas, as follows:—

	Annual Value.	Assessment.
Premises, dwelling-houses, shops, buildings, land, and premises, and the trunks, pipes, and other apparatus, for the conveyance of gas belonging to the company, situate and being fixed in the ground, in the parish of *Birmingham*, and the profits arising therefrom within the parish.	£800	£20

Upon hearing an appeal against this assessment, the Court of Quarter Sessions confirmed the same, subject to the opinion of this Court, on the following case:—

By the 59 *Geo.* 3, entitled, "An act for better supplying the town of *Birmingham*, in the county of *Warwick*, with gas," certain persons therein named, and their successors, are declared to be a body politic and corporate, by the name of "The *Birmingham* Gas Light and Coke Company," and powers are given them to supply the town with gas, to enter into contracts for the lighting of houses, &c. therewith, and with the consent of the Commissioners for Lighting and Paving the Town, to break up the soil and pavements of the streets, &c. for the purpose of laying down pipes, and other necessary apparatus, for the conveyance of gas from the manufactory to the houses, &c. of the con-

1823.

The KING v. The BIRMINGHAM GAS COMPANY.

sumers." In pursuance of the provisions of this act, the company purchased the dwelling-houses, shops, buildings, lands, and premises, mentioned in the assessment, and erected and placed therein, retorts, gasometers, purifiers, and other apparatus necessary for the manufacture of gas and coke, (and part of which apparatus is affixed to the freehold, and part is not), and also by the consent of the aforesaid commissioners, broke up the soil and pavement in the streets, and fixed therein the trunks, pipes, and other apparatus for the conveyance of gas, mentioned in the said assessment, and which communicate with the house and manufactory. The company carry on a considerable manufacture of coke and gas upon the premises so purchased, and derive a profit from the sale of each of those articles. The coke is conveyed from the premises of the company, to those of the purchasers, by means of carts and waggons, and the gas, by means of the trunks, pipes, and other apparatus for the conveyance of gas, mentioned in the assessment. Gas and coke are both manufactured from coal at a great expence of fuel, and the machinery and apparatus necessary for the manufacture of these articles, are also very expensive, and require frequent renewal. Stock in trade, and the profits of the manufactories in the parish of *Birmingham*, are not rated to the poor in this rate. The premises, trunks, pipes, &c. mentioned in the assessment as belonging to the company, if rated to the poor, as other lands within the parish, that is to say, if the profits arising from the sale of gas are not included, are worth 200*l.* per annum, but are worth 800*l.* if the profits arising from the sale of gas are included. If the Court should be of opinion that the profits accruing to the company from the sale of gas, are not rateable, or that they can only be rated as the profits of a manufactory, the rate ought to be amended by inserting the sum of 200*l.* therein, in lieu of the sum of 800*l.* and the sum of 5*l.* in lieu of the sum of 20*l.*

1823.
The King v. The Birmingham Gas Company.

N. G. Clarke, *Gurney*, *Reader*, and *Holbech*, in support of the order of Sessions. The *Birmingham* Gas Light Company are rateable in respect, not merely of the dwelling-houses, shops, buildings, land, and premises, and the trunks, pipes, and other apparatus fixed in the ground, but also in respect of the profits arising from the sale of gas within the parish. This rateability attaches upon them by virtue of the statute of 43 *Eliz.* c. 2, as occupiers of lands. According to all the authorities, this is an occupation of land, and the profits arising from such occupation, are the subject of rate. When once an occupation of land is established, the amount of rate is to be calculated by the profits arising from such occupation. The cases of *Rex* v. *The Corporation of Bath* (a), and *Rex* v. *The Rochdale Water Works Company* (b), seem not to be distinguishable in principle from the present case. In the first, the corporation of *Bath* were held rateable in respect of their profits arising from the conveyance of water through aqueducts and pipes laid under ground. Upon the same principle in the second, the *Rochdale* Water Works Company were held rateable in respect of their profits derived in like manner. In those cases the foundation of the rate was the beneficial occupation of the soil. So, in the present case, the soil being made use of to earn the profit, the profit is to be considered as an adjunct to the occupation, and therefore rateable upon the like principle. In this point of view, it is difficult to distinguish between water and gas. The same mode of conveyance by an occupation of the soil is adopted, and consequently the same principle ought to prevail in both instances. Undoubtedly coal gas, per se, is not rateable, but when it is connected, as an adjunct, with any thing which is rateable, then it becomes liable. Upon this principle tolls, per se, are not rateable; but when they are connected with the soil in respect of which they arise, then the rate attaches, because they are identified with the soil, and produce a profit

(a) 14 East, 609. (b) 1 M. & S. 634.

1823.

The King v. The Birmingham Gas Company.

to the occupier. This is the principle upon which *Rex* v. *Macdonald* (*a*) was decided. In *Rex* v. *The Calder Navigation* (*b*), *Holroyd*, J., says, "a rate on land is in effect a rate on the profits of the land; for where there are no profits, there is no beneficial occupation." Here there is a beneficial occupation by the means stated in the case, and, upon the authority of these cases, this company are clearly rateable for such beneficial occupation. All that is necessary to shew is, that this company have a tangible local occupation of the soil, and when once that is established the profits arising from it, from whatever means, become rateable. The Court are to combine all the circumstances which tend to give the occupation an entire value, and are not to separate the mere value of the pipes and apparatus from the gas. Upon this principle it was determined, that the profits of a weighing machine (*c*), of a carding machine (*d*), and the canteen of barracks (*e*), were rateable. This case is not distinguishable from these authorities, and therefore the Sessions did right in affirming the present rate.

D. Pollock, *Adams*, and *Finch*, contrà, were stopped by the Court.

Abbott, C. J.—The question presented to our consideration is, not whether the *Birmingham* Gas Light and Coke Company are rateable for the buildings, land, and premises, and the trunks, pipes, and other apparatus occupied by them for the conveyance of gas, but whether they are rateable for the profits arising from the sale of gas. If it were meant to raise the first question, my opinion would be (speaking upon the subject judicially), that the company are only rateable for the amount at which the buildings and other premises mentioned in the assessment would let to

(*a*) 12 East, 324.

(*b*) 1 B. & A. 269.

(*c*) *Rex* v. *St. Nicholas, Gloucester*, Caldecot, 262.

(*d*) *Rex* v. *Hogg*, Cald. 266. S. C. 1 T. R. 721.

(*e*) 4 M. & S. 317.

1823.

The King v. The Birmingham Gas Company.

any other persons for the purpose of carrying on a manufactory. But the form in which this case is presented to us does not raise that question. If we look to the mode in which this rate is estimated, and to the statement of the last paragraph of the case, this appears conclusive. It states, that "the premises," which I understand to mean the buildings, "trunks, pipes, &c." which may mean the ground in which the trunks and pipes are placed, mentioned in the assessment as belonging to the company, if rated to the poor as other lands within the parish, that is to say, if the profits arising from the sale of gas are not included, are worth 200*l.* per annum, but are worth 800*l.*, if the profits arising from the sale of gas are included. If the Court should be of opinion that the profits accruing to the company from the sale of gas are not rateable, or that they can only be rated as the profits of a manufactory, the rate ought to be amended, by inserting the sum of 200*l.* therein, in lieu of the sum of 800*l.*, and the sum of 5*l.* in lieu of the sum of 20*l.*" I am of opinion that the profits accruing to the company from the sale of gas are not rateable, and are not to be rated as the profits of a manufactory; for it appears from the statement of the case, that the profits of a manufactory are not rateable in the hands of any other persons. The distinction in the present case is, that the company are rated not merely for their premises, but in respect of the profit of a manufactory, which is something obtained by the skill and labour of man, and from money laid out in the purchase of materials, which are afterwards to be altered and brought into another shape and form. That circumstance renders this case perfectly distinguishable from all other cases; from the cases of canals, waterworks, lighthouses, locks, and other property of that description. For this reason it is, that the cases of *Rex* v. *The Corporation of Bath*, and *Rex* v. *The Rochdale Water Works Company*, are directly at variance with the present. In those, the rate was upon the water, which is a natural produce, but here

1823.

The King v. The Birmingham Gas Company.

it is upon gas, which is an artificial produce, obtained by the labour, skill, industry, and capital of the company. An inhabitant may be rated for the profits of his trade; but if this company is to be rated in respect of their gas, the rate would be imposed upon them on a very different principle. Here they are rated upon the sale of their gas, as occupiers of land, which I think cannot be supported. I am opinion therefore that this rate must be amended, by inserting the sum of 200*l.* instead of 800*l.*

Bayley, J.—I am of the same opinion. This is entirely a question of quantum. In most of the cases which have formerly been before the Court, the only question was, whether there has been any rateable property or not, and in such cases reference was made to the profits as being the criteria by which the quantum of rate was to be ascertained. Such was the question with respect to canal locks. When the rate was imposed upon the lock, the profits were referred to as the mode of fixing the quantum; but whether the quantum of rate has been properly fixed, is a question into which the Court do not inquire, nor into which they feel themselves at liberty to examine, unless it is specifically pointed out to their consideration. In the present case the quantum is specifically pointed out, and our attention is directed to a distinction between the value of the occupation of the land per se, and the profits resulting from carrying on, by means of the occupation, a beneficial manufactory. Now the criterion by which the value of this land, covered as it is by warehouses, buildings, and used, as it is, by a pipe way, is the fair rent which ought to be paid for other land in the same parish. When the land is rated, it is rated according to the fair rent which it will fetch, and not according to the profit which particular persons might, under extraordinary circumstances, produce from it, by a particular mode of occupation. Its value is to be estimated according to a probable rent, if let to any other persons,

1823.
The King v. The Birmingham Gas Company.

and not according to temporary profits, arising from the sources which are unconnected with the land itself, and with reference to the value of which alone the rate ought to be imposed. Here the gas forms no part of the profits of the land; it is a manufactured article, produced by labour, and the investment of capital, and the profits upon which depend upon the price of coals, labour, and a variety of other circumstances. Looking at this, therefore, as a question of quantum, expressly submitted to our consideration, we are at liberty to decide the case upon that footing. If the case stated that these buildings, warehouses, and pipe-ways would have let for 800*l*. per annum, then we should have nothing to decide upon, but when we are informed that the rate is imposed partly upon the buildings, and other premises, and the remainder upon the profits arising from the sale of the gas, which is produced from the investment of capital, and a variety of other circumstances, we are bound to decide the case with reference to that distinction. Referring to that distinction, I am of opinion that the larger rate cannot be supported, and therefore it must be amended by inserting 200*l*. instead of 800*l*.

Holroyd, J.—This is not like the case of a canal, where there is a beneficial use of the land by means of the water. The land in such case is rated as so much land covered with water. Here, it is professed to rate the trunks and other apparatus, but it is in reality a rate upon the gas itself, which is not a natural produce, but is manufactured at the expence of human labour and capital. In this respect the case is distinguishable from those cases which have been cited. I think the profits arising from the sale of gas are not rateable, and that this rate must be confined to the buildings, pipes, trunks, and apparatus.

Best, J.—I have no difficulty in saying that this rate cannot be supported in the manner, and under the circum-

1823.

The King v. The Birmingham Gas Company.

stances in which it is made. It it appears to me, that gas, as an artificial produce, cannot be made the subject of a rate, in respect of the occupation of land, and that it would be gross injustice to make this manufactory rateable on that principle. The question is not, whether these trunks, pipes, and other apparatus, are rateable property, but whether the profits arising from the manufacture of gas are rateable. The case expressly finds that stock in trade and the profits of the manufactories in the parish of *Birmingham* are not rated in any case to the relief of the poor. Now this is obviously a rate upon the profits of a manufactory, and therefore, upon the principle that other manufactories are not rateable, they ought not to be rated. Profits on a rent cannot be rated, nor are any uncertain profits rateable, on account of the difficulty of establishing an equal rate. The profit, in this instance, is produced at an enormous expence, and at considerable hazard of capital, and has not a permanent annual value. Here there must be an union of capital and constant employed labour, in order to produce a profit. In this respect the case is distinguishable from a canal, where, when once the wharfs and locks are established, they remain permanently, and produce a permanent profit, but not so of a gas manufactory, where there must be an application of human labour, and a consumption of coal, day by day, in order to produce the article for sale. For these reasons I am of opinion, that this rate ought to be amended in the manner suggested.

Rate ordered to be amended, by striking out 800*l.*, and inserting 200*l.*, and by striking out 20*l.*, and inserting 5*l.*

The KING *v.* The INHABITANTS of NORTH COL-LINGHAM.

Wednesday, April 23.

Renting a house, and letting part of it off to a lodger, is holding a separate and distinct dwelling-house within the statute 59 *Geo.* 3. c. 50, so as to confer a settlement.

A *tenement,* within the meaning of that statute, may consist of house and land taken at different times and of different persons, provided the whole annual rent amounts to 10*l.*, and the land and house be in the same parish.

BY an order of two Justices, *Mary*, the widow of *William Barks*, with their three children, were removed from the parish of *North Collingham*, in the county of *Nottingham*, to the parish of *Fulbeck*, in the county of *Lincoln*. On appeal the Sessions quashed the order, subject to the opinion of the Court, on the following case:—

The pauper's husband, being legally settled in *Fulbeck*, came to reside at *North Collingham* in the year 1812, where he took and hired a house (being a separate and distinct dwelling-house) with a garden for a year, and from year to year, at the annual rent of 6*l.* 6*s.*; and he continued to hold and occupy such house and garden, and actually paid the aforesaid yearly rent for the same, from the year 1812 up to his death, which happened in *December*, 1821; but during the last four years of his holding the said house, he let to a lodger at 30*s.* a year, one of the rooms thereof, which room was on the ground floor, and communicated with a yard appurtenant to the house, by an outer door, and with the adjoining rooms of the house, by an inner door, of which doors the lodger kept the keys, as there was another outer door to the house. No alteration was ever made in the house or doors during any part of the period, for which *William Bark* was tenant thereof. The room was let unfurnished, and the lodger occupied nothing but the room, and *William Bark* was assessed and rated for the entire house to the poor, the highways, and king's taxes, and paid such assessments during the whole of his tenancy. In the year 1819 the pauper bonâ fide hired a piece of garden ground, in the parish of *North Collingham*, for the year, at the rent of 3*l.* 15*s.*, which ground he actually oc-

1823.

The KING v. The INHABITANTS of NORTH COLLINGHAM.

cupied for a year, and paid the said rent, and he continued in the occupation thereof up to the time of his death. The question for the opinion of the Court is, whether the pauper's husband gained a settlement under the stat. 59 *Geo.* 3. c. 50, which received the royal assent on the 2d *July*, 1819, it being admitted that the garden ground mentioned in the case was hired after the passing of that act.

Nolan and *Clinton*, in support of the order of Sessions, contended, that a settlement was gained by the pauper in *North Collingham*, and consequently that the order of Sessions, quashing the order of removal, must be affirmed. Two questions arise in this case upon the construction of the 59 *Geo.* 3. c. 50; first, whether a person who has taken a house, being an entire and distinct dwelling-house, can be prevented from gaining a settlement, by letting off a part of it to a lodger; and, second, whether the whole of the tenement, which is to confer a settlement, must, under this statute, be taken at one and the same time. As to the first point it is quite clear, that before the passing of this act, taking a tenement of the yearly value of 10*l.* would gain a settlement, though a part of it was underlet. *Rex* v. *Llandverras* (a), and *Rex* v. *Newnham* (b). There is no doubt, therefore, that letting part of the tenement to a lodger would make no difference before the 59 *Geo.* 3. The question then is, whether that act makes any difference in the old rule of settlement law upon this point. Now there is nothing in this statute which would render the circumstance of under-letting destructive of the settlement. All that the statute requires is, that there should be a bonâ fide hiring and occupation of the house during the whole year. It is by no means necessary that the occupation of every part of the house should be exclusive. It is only requisite that the pauper should continue the tenant, and reside for twelve months. The object of the legislature in passing

(a) Burr. Sett. Cases, 571. S. C. Sir W. Bl. Rep. 603.
(b) Id. 756.

this act was, not to prevent the person who *lets* lodgings from gaining a settlement, but to prevent a mere *lodger* from gaining a settlement. In this very case the person who took the room might, by the old law, have gained a settlement, if he had paid four shillings a week, but it was to prevent the gaining of settlements by such means that the legislature passed this act; to remedy the evil arising from constructive settlements, and to establish one plain and intelligible rule, namely, that no settlement should be gained by renting a tenement but by the person who really and bonâ fide, in the first instance, became the ostensible tenant of a house of 10*l.* per annum, and continued to reside during the whole year. Now every circumstance stated in this case, brings it distinctly within the statute. The Sessions have found that the husband of the pauper took and hired a house, being a separate and distinct dwelling-house, and continued to hold and occupy such house during a period of nine years. The terms of the act therefore have been literally fulfilled in every particular. The pauper continued an ostensible substantial tenant, and so far as the underletting goes, that circumstance is perfectly immaterial, it being sufficient that the pauper took the house and continued the responsible tenant during twelve months. Then, secondly, the question is, whether in order to gain a settlement, there must be one entire taking from one person at one single rent, or whether a settlement may be gained by taking at two several hirings, a house of one person, and land of another. Now there is nothing in the statute which shews it to have been the intention of the legislature to alter the mode and manner of taking the tenement, according to the old law of settlement. The statute does not require that the tenement shall be entire. It speaks merely of "tenement," in the singular number, and therefore the law remains as it was previously to the passing of the act. It is clear, from a variety of cases, that before this statute, lands and houses taken, at different times, might be coupled

1823.

The King v. The Inhabitants of North Collingham.

together, so as to form one tenement. The 13 & 14 *Car.* 2. and the 9 & 10 *Wm.* 3. c. 2. both use the word "tenement," in the singular number, and yet it has been held, over and over again, upon the construction of this word, as used in these statutes, that distinct tenements, when of sufficient conjunct value, whether situated in the same, or in different parishes, or taken at different times, and of different landlords, or held by distinct titles, are sufficient to confer a settlement. *North Nibley* v. *Wootton under Edge* (a). *Rex* v. *Sandwich* (b). and *Rex* v. *Newnham* (c). The Sessions, in the construction of this act, have followed these decisions, which fully warrant their determination.

Scarlett and *Balguy*, contrà. The 59 *Geo.* 3. is a remedial statute, and is to be construed most liberally in order to effect the object of the legislature, which clearly was to put an end to constructive settlements by renting a tenement. This is manifest from the language of the preamble, which recites, "that whereas many disputes and controversies have arisen respecting the settling of poor people in parishes in *England*, by the renting of tenements," and then proceeds to enact, "that no settlement shall be gained by renting a tenement, unless such tenement shall consist of a house or building, being a separate and distinct dwelling-house or building, bonâ fide hired, at and for the sum of 10*l*. a-year, at the least, for the term of one whole year, nor unless such house or building shall be held and occupied, and the rent for the same actually paid, for the term of one whole year, at the least, by the person hiring the same." To gain a settlement, therefore, it must be shewn, first, that the party had actually dwelt in, used, and exclusively occupied the house during the whole year; and, second, that he actually held a tenement at one entire rent, and one entire taking, of 10*l*. a-year. Now, neither of these requisites is established in the present case. In the first

(a) Foley P. L. 79. (b) Burr. S. C. 44. (c) Id. 176.

place, there is no actual dwelling, use, and occupation of an entire house, which is necessary according to the language of the statute. The house in question is not one entire tenement, for the pauper lets a part of it off to a lodger. He is therefore not the exclusive occupier of a house or building. It is quite clear, that when the under-letting took place, the pauper had no right to enter that part of the premises which he had so let off, and if he had thought proper so to do, he might be treated as a trespasser. The case expressly finds; that there were two outer doors to the house, one of which belonged to the room demised to the lodger, who kept the key of that door. In every sense of the word, this was a distinct tenement, and the holding and occupation by the pauper's husband were not entire. If, indeed, the key of the door of communication to the lodger's apartment, had been kept by the pauper's husband, this argument would fail, but the key being under the entire control and power of the sub-tenant, it is the same thing as if the apartment had been separated by a wall. Then, secondly, here is not one entire taking of a tenement of 10*l.* a-year, and on this ground the settlement cannot be supported. The house and the garden ground, although situate in the same parish, are held of different landlords, and cannot be coupled together, and considered as one tenement, within the meaning of the statute, which requires one entire hiring of a house or land, or of both, at one entire rent of 10*l.* at the least. These are separate tenements, neither of which is of the requisite value, and consequently no settlement is gained. It would be contravening the policy of this statute to hold, that the land might be coupled with the house, so as to constitute one entire tenement, and would again open the door to those constructive settlements, which it was the anxious object of the legislature to prevent.

Abbott, C.J.—This question arises upon the construction of an act of parliament, which, I think, was certainly

1823.
The King
v.
The Inhabitants of North Collingham.

passed for the purpose of restraining constructive settlements; but it is a general rule of construction, that acts of parliament, which are made upon the same subject-matter, are to have the same construction and effect, if they contain similar words and expressions to those used in the previous statutes. It is clear, that before the passing of this act, a tenement of 10*l.* a-year, might consist of several different parcels, taken at different times, and at different rents. The first question is, whether, under this act, the tenement must be all taken at one and the same time, and at one and the same rent. The statute declares, that no settlement shall be gained by renting a tenement, "unless such tenement shall consist of a house or building, being a separate and distinct dwelling-house or building, *or of land, or of both,* bonâ fide hired by such person, at and for the sum of 10*l.* a-year at the least, for the term of one whole year, nor unless such house or building shall be *held*, and such land *occupied*, by the person hiring the same." Thus far, this act restrains the former statutes as to value; but though there must be a hiring, still it does not say, that it must be one and the same hiring, nor does it say that the tenement shall be one distinct and separate matter. Therefore, I think, we are bound to construe this, like former acts relating to settlements, and to hold that the tenement may consist of house and land, taken at different times, and of different persons, provided the whole annual rent amounts to 10*l.* and is bonâ fide paid. Then the question is, whether there was a holding of the house, and an occupation of the land, by the pauper's husband for one whole year. The word "held," used in the statute, is applied to the dwelling-house, and if that be construed fairly, it seems to me, from the finding of this case, that the pauper's husband *held* the whole of this tenement. The difference of expression "held," as applied to the house, may have been intended by the legislature to meet the case of lodgers, properly so called, and to prevent the question

arising, whether a person could be said to occupy a whole house, provided he let the whole or part of it in lodgings. The remaining point then is, whether this person held the whole of this house. It is contended that he did not, because the person, here called a lodger, occupied a part of the house separate and distinct from the rest, so as to convey a doubt whether it was the dwelling-house of the pauper's husband. If that proposition had been established, no settlement would have been gained. But, looking to the facts of the case, I think the proposition is not sustained. The facts stated are, "that the person called a lodger, took a room on the ground-floor, communicating with a yard appurtenant to the house, by an outer door, and with the adjoining rooms of the house, by an inner door, of which doors the lodger kept the keys, as there was another outer door to the house." It is insisted, that by putting the key of the door of communication into the hands of the person called the lodger, it is the same as if a wall had been erected, so as completely to separate the apartment from the rest of the house. If the case had found that the key had been put into the hands of the lodger to prevent any communication between one part of the house and the other, there might have been more weight in the argument; but it is left uncertain whether the key was put into the hands of the lodger to enable him to enter by the outer or the inner door, and therefore there does not appear to have been a complete separation of the room from the rest of the house. That fact being left in a state of uncertainty, and it not being stated that the object of delivering the key was to prevent communication, we must rather infer that the object was to allow the lodger to go from one part of the house to the other, at his pleasure. It seems to me, therefore, that the occupation of this room is not made out to be separate and distinct, but that the pauper's husband must be said to be the holder of the house in like manner, as if the lodger had not rented this particular room. That point being at least left doubtful, I think we are at liberty to consider the

1823.

The King
v.
The
Inhabitants
of North
Collingham.

pauper's husband as the person holding the whole, though the lodger occupied one of the rooms. For these reasons I think the order of Sessions must be confirmed.

Bayley, J.—I am of the same opinion. I think the second point is more a question of fact than of law. The Sessions might have decided whether the house was occupied as "a separate and distinct tenement, dwelling-house, or building." At the time when the pauper's husband originally took the house, there is no question that it was "a separate and distinct dwelling-house or building," and I do not see any thing to authorise us in saying that it ceased to be a separate dwelling-house when one of the apartments was let to a lodger, because the husband of the pauper still continued to be the *holder* of a distinct dwelling. I do not inquire into the other parts of the case with much minuteness, because I think we are bound to construe this act in the same way as other acts of parliament upon the same subject-matter, and to act upon the decisions which have been referred to in support of the order of Sessions.

Holroyd, J.—I think we must construe the word "tenement," as it has been construed in former acts of parliament, with reference to which this act is made. The act begins by reciting, that "whereas many disputes and controversies have arisen respecting the settling of poor people in parishes in *England*, by the renting of tenements." The legislature only meant to alter the law in those things which are made requisite by this act of parliament to be done to gain a settlement, but it leaves the law in other respects as it was before, as to what should be considered a tenement. We are bound to say, therefore, that the tenement may be made up of house and land, though taken separately, and at different rents. Upon the second point, it appears to me, according to the facts stated in the case, that although one room of the house was let off, yet the whole must be considered as one dwelling-house, held by the pauper's hus-

band. He is clearly the responsible holder of the house; he pays the rates and taxes which are imposed on other houses, and he is, in the strict sense of the word, a householder.

1823.

The KING v. The INHABITANTS of NORTH COLLINGHAM.

BEST, J.—We are to construe this act according to the rules by which other statutes upon the same subject have been construed. The first point urged for our consideration is, whether this is to be treated as one dwelling. I am of opinion that we must consider it as one dwelling, in the occupation of the pauper. If it were not, no person in the city of *London*, who should let off a single room of his house, could gain a settlement, although he paid a rent of ten times 10*l*. a-year. It is well known to be a common practice in this city, and many other places, for persons to take large houses, occupy only a small part themselves, and let off the remainder to lodgers, from whom they derive the means not only of paying the whole of their rent, but even of gaining a livelihood; and yet, according to the construction now contended for, these persons would not gain a settlement in the parish in which their houses were situated. That is a proposition, however, which cannot be maintained. But it is supposed that there was a separation of the room from the house, so as to negative the idea of an exclusive occupation. There is no separation which can have that effect. It is all one tenement, and it is impossible to say that it is not the dwelling-house of the pauper's husband. The case finds, that there is an internal communication between the lodger's room and the rest of the house, and therefore it must be considered as part of the same house. The pauper's husband is the person whom the law considers as the tenant for all purposes of occupation and rateability. He is the holder of one entire tenement, and in addition thereto occupies land, the rent of which, added to that of the house, is sufficient to gain a settlement.

Order confirmed.

1823.



Wednesday, April 23.

The KING *v.* The TRENT and MERSEY CANAL COMPANY.

A canal company are rateable to the relief of the poor, in each and every parish through which their canal passes, as occupiers of land covered with water.

THE defendants having been rated to the relief of the poor of the township of *Findern*, in the county of *Derby*, the Sessions on appeal confirmed the rate, subject to the opinion of this Court, on the following case:—

The appellants were incorporated by an act of 6 *Geo.* 3. by the name of "The Company of Proprietors of the Navigation from the *Trent* to the *Mersey*," and empowered to purchase lands to them and their successors and assigns, for the purpose of making a navigable cut or canal from the river *Trent* to the river *Mersey*. And it is by that act enacted, "That it shall be lawful for the said company to demand and take for their own proper use and behoof, for tonnage and wharfage for all goods and commodities whatsoever, which shall be conveyed upon the said canal, such rates and duties as the said company shall think fit, not exceeding the sum of one penny halfpenny per mile for every ton of such goods and commodities which shall be conveyed upon the said canal, which said rates and duties shall be paid to such person or persons at such place or places near to the said cut or canal, in such manner and under such regulations as the said canal company shall direct or appoint." And it is further enacted, "That all persons whatever shall have free liberty to navigate with boats upon the said canal, under certain regulations, upon payment of such rates and duties as shall be demanded by the said company, not exceeding the rate thereinbefore mentioned." A part of the said canal being in length about one mile and fifty-two yards, comprising the quantity of land for which the defendants were rated, passes through the said township of *Findern*. The company have no lands, houses, ware-

houses, wharfs, or other property in the said township, except the canal and towing path. No tolls, rates, or duties, are received in the said township, nor do any tolls, rates, or duties become payable there, the company not having so directed or appointed, but the company receive annually a much larger sum than that, in respect of which they are assessed, for tolls for the passage over that part of their canal which lies in the township of *Findern*. The canal company derive very considerable annual profits from the canal. By an assessment made on the day of *October*, 1818, for the relief of the poor of the said township of *Findern*, and duly published, the defendants were rated in the following manner:—

Proprietors.	Occupiers.	Names of Pieces.	Quantity.	Assessments.
Grand Trunk Canal.	Company.	Canal and Towing-paths.	7 a. 962 dec.	4*s.* 11½*d.*

Against this assessment the defendants appealed, upon the ground that they were not the occupiers of, nor have any rateable property in the township of *Findern*. The Court of Quarter Sessions confirmed the rate, subject to the opinion of this Court, upon the above case.

Denman, on a former day, in support of the order of Sessions, was stopped by the Court, and

Scarlett and *Reader* being then asked whether they could distinguish this case from those cases which had decided this principle, namely, that a canal is rateable to the relief of the poor in each and every parish or township through which it passes, according to the value of the land covered with water; and, having expressed confidence that they should be able to distinguish this from those authorities, and shew that at least this canal was not rateable in the township of *Findern*, they were desired to look into the cases, and if, upon consideration, they thought they could point out any sound distinction, they might mention the case again.

1823.

The KING v. The TRENT and MERSEY CANAL COMPANY.

And now, on this day, they confessed their inability to distinguish this case, in principle, from *Rex* v. *Milton* (a). The company in the present case were certainly rated only as the occupiers of so many acres of land covered with water, and therefore they were not so much interested in resisting a rate founded upon that principle, but conceiving that this was only the commencement of a design to establish, first, that a canal company were rateable as occupiers of lands in the parish through which their canal passed, and then that they were rateable in the same parish in respect of their tolls also, though none were received there, they felt themselves called upon to oppose such an attempt. Understanding now, however, that the Court decided no more than that the company were rateable merely as occupiers of lands in the township of *Findern*; and that the Court did not recognize the principle to have been carried farther by *Rex* v. *Milton*, no further argument would be offered against the present rate. It was to be observed, however, as something remarkable, that this was the first time since canals had been established in this country, that any attempt had been made to rate them as so much land covered with water.

PER CURIAM.—Is not that the only correct mode of rating them, according to the language of the statute of 43 *Eliz.* c. 2, which imposes the rate upon "every occupier of land?" Unless they are rated in this form, they cannot be rated at all. The cases which have been decided, establish this principle, namely, that the occupier of lands in every parish, is liable to be rated in respect of the land which he occupies in each, and if a canal passes through several parishes, the undertakers are rateable in each and every parish through which the canal passes, according to the quantity of land occupied. The *Trent* and *Mersey* Canal Company occupy the land which the water covers in the

(a) 3 B. & A. 112.

1823.

Doe v. The Trent and Mersey Canal Company.

township of *Findern*, and are rateable in respect of such occupation.

Order of Sessions confirmed(*a*).

(*a*) See *Rex* v. *The Aire and Calder Navigation*, 2 T. R. 660. *Rex* v. *The Corporation of Bath*, 14 East, 609. *Rex* v. *The Calder and Hebble Navigation*, 1 B. & A. 263. *Rex* v. *Cardington*, Cowp. 581. *Rex* v. *The Grand Junction Canal*, 1 B. & A. 289. *Rex* v. *The Leeds and Liverpool Canal*, 5 East, 325. *Rex* v. *Macdonald*, 12 East, 324. *Rex* v. *The Mayor of London*, 4 T. R. 21. *Rex* v. *Milton*, 3 B. & A. 112. *Rex* v. *The New River Company*, 1 M. & S. 503. *Rex* v. *Nicholson*, 12 East, 330. *Rex* v. *Page*, 4 T. R. 543. *Rex* v. *The Rochdale Water Works Company*, 1 M. & S. 634. *Rex* v. *Sculcoates*, 12 East, 330; and *Rex* v. *The Staffordshire and Worcester Canal*, 8 T. R. 340.

The Earl of Bristol *v.* Wilsmore, and Page the younger.

Thursday, April 24.

If *A.*, under pretence of a purchase, obtains possession of *B.*'s goods, with a pre-conceived design not to pay for them, and absconds, to avoid suit for the value, and the sheriff seizes such goods in execution immediately after the delivery to *A.*, it seems that *B.* may lawfully rescue them out of the hands of the sheriff even by stratagem, but the validity of the purchase by *A.* is a question for the Jury.

CASE by the plaintiff, as chief steward of the liberty of *Bury St. Edmunds*, in the county of *Suffolk*, against the defendants, for the eloignement and rescue of sixty sheep from and out of the plaintiff's possession, which had been seized and levied under the warrant of the plaintiff, by virtue of the sheriff's mandate to him directed, upon a writ of fieri facias, issued at the suit of *Elizabeth Carver* against the goods and chattels of *William Miller*, at *Mayland*, within the liberty and jurisdiction of the plaintiff. Plea, Not Guilty, and issue thereon. At the trial before *Abbott*, C.J., at the adjourned *Middlesex* Sittings, after *Trinity* Term 1822, the facts appeared to be these:—The writ in question was executed by the proper officers of the plaintiff upon the premises of *Miller*, on the 18th of *May*, 1821, who, amongst other property, took possession of sixty sheep, which were secured in one of *Miller*'s pastures, where they remained in safety during that day and the next. In the course of the ensuing night, the sheep, by some means, (alleged

1823.

The Earl of Bristol v. Wilsmore.

to have been by the contrivance and stratagem of the defendants) got into an adjoining corn field belonging to the defendant *Wilsmore*, by whom they were sent to the pound, and afterwards delivered to the defendant *Page*, a cattle jobber, who claimed them as his property, and refused to deliver them to the plaintiff upon demand. Both defendants knew that the sheep had been taken in execution. It appeared that the sheep had been sold to *Miller* by a servant of the defendant *Page* for account of the latter, on the day preceding the execution. *Page* had directed his servant to sell them *for ready money only*, but they were in fact paid by a draft upon *Miller*'s bankers at *Colchester*, in *Essex*, which was retained by *Page* till the 18th, when it was presented and dishonored. It was alleged, that in consequence of this, *Page* resorted to the contrivance above mentioned, in order to regain possession of the sheep, and with the assistance of *Wilsmore* effected his object in the manner suggested. Upon these facts an objection was taken on the part of the defendants, that in point of law no property in the sheep had passed to *Miller*, the supposed sale being founded in fraud, and consequently they had been wrongfully seized by the plaintiff, and might be lawfully re-taken wherever found. To this it was answered, that even if the objection were good, it was not competent to the defendants to raise it, they being at all events wrongdoers in re-taking the sheep by stratagem and collusion. The learned Judge however was of opinion, that the property in the sheep had passed to *Miller*, and that even if it had not, the defendants were not entitled to the benefit of the objection; and the Jury, under his direction, in point of law, found a verdict for the plaintiff for the full amount of the value of the sheep.

Marryat, in *Michaelmas* Term last, obtained a rule to shew cause why the verdict should not be set aside, and a new trial had, or why the judgment should not be arrested, upon the ground, first, that the learned Judge had er-

roneously decided as a question of law, that which should have been left to the Jury as a question of fact, namely, whether the sale to *Miller* was a bonâ fide sale or no; and, second, that he was mistaken in holding that that objection was not available on the part of the defendants.

Scarlett and *Chitty* now shewed cause against the rule. There are two objections raised in this case. First, that it should have been left to the Jury to say whether any property passed to *Miller* by the sale and delivery of the sheep to him by *Page*; and, second, that the learned Judge misdirected the Jury in telling them that it was not competent to the defendants, being themselves wrongdoers, to take advantage of any informality or fraud in the sale. With respect to the first point, it is not denied that the sheep had been in the possession of *Miller* for two days, when they were seized under the execution, and therefore their removal on the following night was fraudulent and illegal, as a removal out of the custody of the law. [*Bayley*, J. If they were the property of *Miller*, it was so; but had he any property in them?] That is immaterial as respects the wrongful removal; they were taken out of the sheriff's custody, and whether they were the property of *Miller* or not, the possession of the sheriff was the custody of the law, and no person had a right to retake them. [*Bayley*, J. That doctrine is not true to the extent claimed for it. Surely if the sheriff takes the goods of *A.* under a writ directed against *B.*, *A.* may legally retake them wherever he can find them.] Not if they are in the custody of the law. Then the important question arises, had the property in the sheep passed to *Miller*? Now, that is a question of law, and not of fact for the Jury. The transaction was the simple and ordinary one of goods sold and delivered; there was a bonâ fide sale, and an actual and complete delivery; and that was by law sufficient to pass the property. [*Bayley*, J. Was it a bonâ fide sale? They are sold by a mere servant, who

1823.

The Earl of Bristol v. Wilsmore.

perhaps exceeded his authority; for his instructions were to sell for ready money only.] If this transaction, and the interval that had elapsed before the execution, did not pass the property to the vendee, what dealings, and what interval are sufficient for that purpose? Where is the line to be drawn? The mode of payment could not affect the transaction; payment by a check is a ready money payment, and was accepted as such in this case. Suppose *Miller* had immediately resold the sheep to a third person, would they have been seizable in the hands of the third person? And if not, which cannot be contended, why should they be seizable in *Miller*'s hands? A sale in market overt, it is not disputed, would have passed the property, and in what respect does this transaction differ from a sale in market overt? If this sale be not binding upon the property, the great majority of all sales might be rendered inoperative, for nineteen out of twenty are conducted precisely in the same manner as the present. [*Bayley*, J. A man authorises his servant to sell property for him *for ready money only*, the servant sells for a check, which turns out to be worth nothing; does that act of the servant bind the master?] Certainly it does. The act of the servant is, in all such cases the act of the master; the general authority to sell over-rides the stipulation as to the mode of payment, and makes the contract valid, whether the money is paid or not. But this case goes further, for here the master accepts the checks as a payment, and keeps it an entire day, and that is a complete ratification, and acceptance of the contract itself. The principles which govern the law of stoppage in transitu apply by analogy to the present case. There the change of property is complete, and the right of stoppage is barred, so soon as a delivery has taken place; and so here, where the goods are delivered, the property in them is passed, and the right to annul the contract is gone. In this case, therefore, the sheep were the property of *Miller*; they were seized by the sheriff as such; they then became placed in the cus-

tody of the law, and from thence not even the owner himself, much less the person who has devested himself of the ownership by a sale and delivery, can legally remove them. But, secondly, if this objection were tenable in itself, it is not competent to the defendants on this record to take advantage of it, because the alleged fraud is not such as would render *Miller* amenable in a criminal prosecution, supposing he had sold the sheep to a third person. Both these points, therefore, were properly decided by the learned Judge who tried the cause, and there is no ground for disturbing the verdict which the Jury have, under his direction, found.

Marryat, (with whom was *Walford*) in support of the rule. The contract was attended with fraud on the part of the purchaser, and by error on the part of *Page*'s servant, who, through ignorance, exceeded the authority with which he had been vested. It is therefore no contract at all to bind the principal, or to pass the property, and it should at least have been left to the Jury to say whether it was such a sale as the owner of the sheep had authorised his servant to make. It has, however, been decided, that where the buyer practises a fraud upon the seller, no property passes from the one to the other, even by the delivery of the goods; *Noble* v. *Adams* (a), and *Read* v. *Hutchinson* (b); and therefore no property passed in this case; because the act of payment by a check, which *Miller* knew to be of no value, was a gross and decided fraud on his part, and violated the contract in toto. Then, secondly, this is a good objection on the part of the present defendants. It was suggested at the trial that it was not competent for the defendants to raise it, because if *Miller* had resold the goods, he would not have been indictable either for a larceny, or for a fraud; and the case of *Rex* v. *Lara* (c) was cited. But that argument does not go the whole length required to support it. It may indeed be admitted, that he would not have been in-

(a) 7 Taunt. 59. (b) 3 Campb. 352. (c) 6 T. R. 565.

1823.

The Earl of Bristol v. Wilsmore.

dictable for a larceny; and *Rex* v. *Lara* also decides, that he would not have been indictable for a fraud *at common law*, because no false token was used. But he clearly would have been indictable under the statute 30 *Geo.* 2. c. 24, for obtaining the goods *by false pretences*, for that statute makes no mention of a false *token*, the *pretence* is sufficient, and this was expressly decided in *Rex* v. *Jackson* (*a*). The Court stopped him.

Abbott, C. J.—Upon further consideration, I think, and all my learned Brothers are of the same opinion, that if *Miller* obtained possession of these sheep with a pre-conceived design not to pay for them, and to abscond, in order to prevent his being sued for the value, he obtained them by such a fraud as would prevent the property passing legally, according to the cases of *Noble* v. *Adams*, and *Read* v. *Hutchinson*, which have been cited. It must be a question of fact for the consideration of the Jury, whether that was so or not, and I now think, in concurrence with my learned Brothers, that I ought to have left it to the Jury. As to the other point, what occurred to me at the trial was, that inasmuch as the defendant *Page* had repossessed himself of the sheep by a trick, it was not competent for him to say, that the property had not passed to *Miller*. My learned Brothers think, and I am disposed to concur with them, that I took an incorrect view of the subject, because, referring to the principle of this action, it could not be maintained by the sheriff, unless the goods seized by him were the property of the person against whom the execution issued. If these sheep were not the property of *Miller*, the plaintiff ought to have been nonsuited. The proper mode therefore of deciding that question, is to grant a new trial.

Rule absolute.

(*a*) 3 Campb. 370.

The KING *v.* RICHARD BOWER.

Thursday, April 21.

A charter of incorporation empowered the mayor and aldermen *for the time being*, or the greater part of them, to choose and name four of the burgesses or inhabitants, "out of which four so to be named and chosen, the mayor, aldermen, bailiffs, principal burgesses, and other burgesses, and inhabitants *for the time being* (they being also for that purpose there, upon the same day, congregated and assembled together), *or the greater part of them as should be so congregated and assembled*, might have power and authority by the greater part of the voices of them so assembled together, to choose and make one to be the mayor." Held, that the election of a mayor by a majority of the whole elective body taken collectively was invalid, it appearing that there was not a majority of the definite body of principal burgesses present at the time of the election.

INFORMATION in the nature of quo warranto against the defendant for exercising the office of mayor of the borough and town of *Weymouth* and *Melcombe Regis*, in the county of *Dorset*, from the 22d *September*, 1821, until the time of exhibiting the information, without any legal warrant, &c. To this information the defendant pleaded, that *Geo.* 3. by charter, dated 25th *May*, in the forty-fourth year of his reign, granted, that the mayor, aldermen, bailiffs, burgesses, and commonalty of the said borough and town, and all the burgesses and inhabitants thereof, by whatever names theretofore known or incorporated, should be one body corporate and politic, &c.; that there should be a mayor, divers aldermen, two bailiffs, and twenty-four principal burgesses, who should be assistant unto the mayor, aldermen, and bailiffs for the time being, in all matters whatsoever concerning the borough and town; that he then constituted *Samuel Western*, Esq., to be the first mayor, until the feast of *St. Matthew the Apostle*, then next ensuing, and from thenceforth until another should in due time be chosen into the office; and eleven persons to be the first aldermen, who were to continue for life, unless amoved for reasonable cause by the mayor, aldermen, bailiffs, and principal burgesses for the time being; and two other persons named to be the first bailiffs; and twenty-four other persons named to be the principal burgesses, to continue for life, unless amoved for reasonable cause by the said mayor, aldermen, bailiff,* and principal burgesses for the time being, or the greater part of them; that the king fur-

1823.
The KING v. BOWER.

ther granted unto the mayor and aldermen of the said borough and town for the time being, or the greater part of them, full power and authority to choose and name on the feast day of *St. Matthew the Apostle* in every year, in the Guildhall of the borough and town aforesaid, or in some other convenient place, within the borough and town aforesaid, being congregated and assembled together, four of the burgesses or inhabitants of the borough and town, whether the same, or any of them were, or had been aldermen, bailiffs, or principal burgesses, or not, out of which four *so* to be named and chosen, the mayor, aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants of the borough and town, *for the time being*, (they being also for that purpose there, upon the same day, congregated and assembled together) "*or the greater part of them, as should be so congregated and assembled,*" might and should have full power and authority, *by the greater part of the voices of them so assembled together*, choose and make one to be the mayor, who should be sworn into office before the last mayor or recorder for time the being, in the presence of all the aldermen and principal burgesses for the time being, which should be then present, and should execute the said office for one whole year, and until another mayor was appointed, &c.; and in case of the death or amotion of any of the aldermen by the mayor and rest of the aldermen, &c. for the time being, there should not be eight aldermen surviving and remaining, it should be lawful for the mayor and aldermen surviving and remaining, and also for the bailiffs and principal burgesses for the time being, or the greater part of them, so many as they should want of the aforesaid number of eight aldermen, out of the burgesses or inhabitants, to elect and choose, &c. who should remain for life, unless amoved, &c.; and should be sworn into office before the mayor for the time being. And it was further granted, that every mayor, if not amoved, should immediately after the execution of his office, be an alderman. The plea then

stated the acceptance of the charter, and that on the 21st *September*, in the 2d year of the reign, *J. W. Weston*, Esq., the then mayor, and twenty aldermen, being the greater part of the aldermen of the borough, duly congregated and assembled together, within the Guildhall, for the purpose of choosing and naming four burgesses or inhabitants of the borough, in order that one of such four might be named and chosen mayor for the ensuing year, and being so congregated and assembled, defendant and three other burgesses were chosen and named for such purpose, and that on the same day, twenty aldermen, two bailiffs, twenty principal burgesses, and two hundred other burgesses, and six hundred other inhabitants of the borough, *for the time being*, were duly congregated and assembled within the Guildhall, for the purpose of electing a mayor out of the four persons so named, and being *so congregated and assembled* together for such purpose, *the mayor and the greater part of the said aldermen, bailiff, principal burgesses, and other burgesses and inhabitants, made, chose, elected, &c. the defendant* to be mayor, and defendant was duly sworn into the said office on the 22d *September*, &c. Replications, first, that *J. W. Weston*, the mayor, who presided at the election, was not the mayor at the time alleged in the plea; second, that the greater part of the aldermen did not assemble as alleged in the plea; third, that the supposed mayor, and the supposed greater part of the aldermen, did not choose and name defendant and three other inhabitants for the purpose in the plea mentioned; fourth, that defendant, at the time of his being so chosen and named, was not one of the burgesses and inhabitants; fifth, that at the time of said supposed making, choosing, electing, and appointing of defendant to be such supposed mayor, *a majority of twenty-four principal burgesses* were not assembled, *but ten only* of such principal burgesses were assembled; sixth, that at the time when defendant was supposed to have been made, chosen, elected, and appointed, to be such supposed mayor, there

1823.

The King v. Bower.

1823.
The King
v.
Bower.

were twenty chief and principal burgesses, yet ten of such chief and principal burgesses, and no more, were congregated and assembled; seventh, that the greater part of the principal burgesses did not choose defendant; and, eighth, that the mayor and the greater part of the aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants, did not choose defendant. Rejoinder to the first, second, third, fourth, seventh, and eighth replications, and issue thereon. Demurrer to the fifth replication, and joinder in demurrer. Sur-rejoinder to the sixth replication, that at the time when defendant was so made, chosen, &c. such mayor, there were only nineteen chief and principal burgesses, and that a majority, namely, ten, were congregated and assembled, and issue thereon.

The question intended to be raised in argument upon these pleadings was, whether upon the construction of the charter it was requisite that there should be a majority of the principal burgesses assembled and congregated together, at the election of a mayor, or whether the mode of election stated in the plea was sufficient.

Chitty, in support of the demurrer to the fifth replication, contended, that it was not necessary to the validity of the defendant's election that there should be a majority of the principal burgesses present at the election, but that it was sufficient that the defendant should have a majority of the whole elective body, though a majority of each integral part of the corporation might not be present. This case, he insisted, was distinguishable from any hitherto decided, and was certainly not to be governed by the authority of *Rex* v. *Morris* (a), which was decided upon a former charter of this corporation. By the present charter the king grants to the mayor, aldermen, bailiffs, burgesses, and commonalty, and their successors, "that the mayor and aldermen, or the greater part of them, of whom the mayor for the time

(a) 4 East, 17.

being to be one, may have and shall have full power and authority to choose and name on the feast day of *St. Matthew the Apostle*, in every year, in the Guildhall of the Borough, being congregated and assembled together, four of the burgesses or inhabitants, out of which four, so to be named and chosen, the mayor, aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants of the borough and town aforesaid, for the time being, they being also for that purpose there, upon the same day, congregated and assembled together, 'or the greater part of *them*, as shall be *so congregated*,' may have and shall have full power and authority, by the *greater part of the voices of them so assembled* together, to choose and make one to be the mayor." The fair construction of this clause is, that it is not necessary to the validity of the election that a majority of the principal burgesses should be present. It is to be observed, that the words, "or the greater part of *them*, as shall be *so congregated*," (which are most important expressions) are not to be found in any other parts of the charter which relate to the election of bailiffs and other corporate officers. These words seem to have been cautiously introduced into that part of the charter which relates to the election of mayor, and it must therefore have been the intention of the crown that the election of that officer should depend upon the majority, not of the definite body, but of the whole body, definite and indefinite, taken collectively, when so congregated. This seems a reasonable construction when reference is had to the mode of electing inferior officers. In the choice of subordinate officers, there is not the same reason for requiring the same mode of election as in the election of mayor. That officer represents the whole body of the corporation, and therefore it may be very fit and proper that his election should take place by the majority of the voices of all the burgesses and inhabitants congregated together. If it were necessary that a majority of each definite body should be present to render the election valid,

1823.

The King v. Bower.

such a rule of construction might lead to the most inconvenient consequences; for it might be competent for one or two individuals, of any of the definite bodies, to defeat the election of a mayor, although a majority of the whole corporate body collectively assembled might have elected the particular individual nominated. Such a construction, however, cannot be put upon that part of the charter which relates to the election of mayor. The words "or the greater part of *them* as shall be *so* congregated," must refer to the whole collective assembly for the time being, who should be so congregated. If it is essential that a majority of the definite body should be present, it is equally essential that a majority of the inhabitants should be present. The election is to take place by the whole body at large, and is not to be governed by the circumstance whether there be a majority of any of the integral parts concurring in the election. The words already pointed out, appear to have been purposely introduced, in order to prevent the possibility of one or two of the definite body defeating an election by a majority of the voices of the whole elective body. The "greater part of *them so* congregated" clearly refers to the whole elective body, and cannot be understood to mean a majority of each integral part. In *The Queen* v. *Lock* (a) it is said, "If an act to be done be referred to the constituent members of a corporation, nothing can be done but by the majority of those who are the constituent part of the corporation; but where a thing is referred to be done by the commonalty, there the majority of those who are present (all being summoned) will determine and bind the rest; but in the other case the majority of those who are present will not do." If, therefore, the construction now contended for be correct, this is an authority to shew, that the election of the defendant is valid. This construction is strengthened by reference to the clause of the charter relating to the election of bailiffs. By that clause the bailiffs are to

(a) 6 Vin. Abr. 269.

1823.



The KING v. BOWER.

be chosen by the mayor, aldermen, bailiffs, and principal burgesses. So, with respect to the election of principal burgesses, they are to be elected in like manner, and in the election of both these officers, the concurrence of the inhabitants is unnecessary; whereas in the election of a mayor, the inhabitants are to be assembled and congregated, and their voices are essential to the validity of the election. There being therefore this marked distinction in the mode of electing the different officers, the construction of the clause in question contended for, is fully supported.

Adam, contrà. The election of the defendant in this case is clearly bad, there not having been a majority of the principal burgesses present at the time of the election. This construction is fully warranted by *Rex* v. *Morris* (*a*), *Rex* v. *Bellringer* (*b*), *Rex* v. *Varlo* (*c*), *Rex* v. *Lock* (*d*), *Rex* v. *Grimes* (*e*), and *Rex* v. *Monday* (*f*). These authorities establish this principle, namely, that where a corporation consists of a definite and an indefinite body, a majority of the definite body must be present, in order to the validity of the election. Unless therefore there are express words of exception in this case, it is quite clear that the general rule must operate to vacate the defendant's election. The words of the charter in *Rex* v. *Morris* are precisely the same as in the present charter, with the exception of a very slight variation, namely, by the introduction of the words, "or the greater part of *them* as should be *so* congregated." Now the simple question is, whether that variation between the former and the present charter is sufficient to justify a decision different from that in *Rex* v. *Morris*. Certainly those words can make no sensible distinction, and the case is concluded by the former decision. The words contained in the paragraph alluded, to clearly shew, that the greater

(*a*) 4 East, 17.
(*b*) 4 T. R. 820.
(*c*) Cowp. 248.
(*d*) 6 Vin. Abr. 269.
(*e*) 5 Burr. 2598.
(*f*) Cowp. 537.

part of *them*, who are to be *so* congregated and assembled, import that there is to be a congregation and assembly of each *definite* part of the body corporate. If that be so, the authorities cited, go directly to shew that this election is void.

Chitty, in reply, contended, that the introduction of the particular passage in question into the charter, was for the purpose of preventing that tumult which might occur in assemblies of this nature. But at all events this passage of the charter did not *in terms* require that the assembly so to be congregated, was to be composed of the original number of twenty-four principal burgesses. All that was required was, that it should be composed of the mayor, aldermen, bailiffs, &c. *for the time being*, and therefore a majority of the existing number would satisfy the requisites of the charter. The question raised upon the replication was, whether there were present at the election, a majority of the then existing number of principal burgesses. Upon the face of the pleadings, there appeared to have been present a majority of the existing number. The original number of twenty-four was reduced to nineteen, and it appeared from the pleadings that ten, who were a majority, were present. There was nothing therefore in the replication which would vacate the election, because ten were the major part of the principal burgesses for the time being. [*Abbott*, C. J. The plea does not aver, that the majority of the principal burgesses were present at the election.] But the plea may be aided by the replication, which specifically states, that there were ten principal burgesses assembled. [*Abbott*, C. J. Still, however, that will not take the case out of the general rule, which requires that a majority of the whole definite body should be assembled.]

Abbott, C. J.—It has been for some years established as a rule of corporation law, and is now become well known

known to the Court, that if an election is to be made by a definite body only, or the assembly is to consist of a definite, and an indefinite body, in such case the majority of the definite body must be present, in order to render the election legal. In those cases where the election is to be by a definite and an indefinite body, if the latter are not present, the majority is not necessary, but if the body consist of both, it is necessary that there should be a majority of the definite body present. This is a general rule, and I think it ought not to be broken in upon by nice and subtle distinctions. This rule, as applied to corporations, has been most wisely established; for it is calculated to compel corporations to fill up such vacancies as may arise from time to time, in the definite body, and not leave the whole government and power of the corporation in the hands of a much less number than the charter requires. That rule is now so well established, that it ought not to be violated, unless there are clear and express words in the charter plainly justifying the invasion. Now, are there such words in this charter? It has been very properly urged, that such words must be found in order to authorise an infraction of the rule. The words of the clause in question are, "That the mayor and aldermen are to meet for the purpose of nominating four of the burgesses, or inhabitants, out of which four, so to be named and chosen, the mayor, aldermen, bailiffs, principal burgesses, and other burgesses, and inhabitants of the borough and town aforesaid, for the time being, (they being also, for that purpose, there, upon the same day, congregated and assembled together) or the greater part of them, as should be so congregated, may have, and shall have full power and authority, by the greater part of the voices of them, so assembled together, to choose and make one to be the mayor." Upon this clause, two things are to be considered, first, who must meet, and, second, when met, who must elect. The persons directed to meet are the mayor, aldermen, bailiffs, principal bur-

1823.

The King v. Bower.

gesses, and other burgesses, and inhabitants of the borough. Then, according to the general rule, that meeting must consist of the majority of the principal burgesses for the time being, and when they shall be congregated and assembled together, they shall have power and authority to elect by the greater part of the voices of *them* so assembled. I own I cannot see any plain or clear difference in sense between the words "the greater part of them as shall be so congregated," and the words "the greater part of the voices of them so assembled." These two sentences have the same meaning, namely, the greater part of them as shall be so assembled. Unless I saw clearly and plainly that it was intended they should have a different sense in another part of the charter, the general rule must have its operation; but I can find nothing in this charter which takes the case out of the general rule which I have already intimated, and which requires the presence of the majority of each of the definite bodies to render the election valid. I am, therefore, of opinion, that judgment must be given for the Crown.

Bayley, J.—Cases of this description must depend upon the words of each particular charter, but when charters are framed in a manner so that the general rule alluded to may be applied, we must abide by that general rule. Now, the case of *Rex* v. *Miller* (a), which was decided in the year 1795, established this as a general rule, namely, that when the right of election is given to the different parts of a corporation, and some of those are definite, and others indefinite, it is essential that there should be a meeting of a majority of each definite part. That decision has not been in any respect broken in upon by any subsequent authority. In the year 1804, the charter in question was granted to the borough of *Weymouth*, and it says, "That the mayor and aldermen *for the time being, or the greater part of them*, being congregated and assembled together, shall choose and

(a) 6 T. R. 268.

name four of the burgesses, &c." According to the case of *Rex* v. *Bellringer* (*a*), it appears, that these words import, that there must be an assembly of the greater part of the whole number of aldermen to constitute an elective assembly. That was decided by the Court in express terms. In that case, the same words were used as in the present, and the Court decided it on the ground, that the words "the greater part of them," came after the words "for the time being." Now, it might, by possibility, make a difference, if the words had been, "the mayor and aldermen, or the greater part of them, for the time being;" but in that respect this charter has adopted the words used in *Rex* v. *Bellringer*, and we must understand them in the sense in which they are used in that case. Then comes that part of the clause which mentions the persons who are to elect. "The mayor, aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants of the borough and town aforesaid, *for the time being*, they being also for that purpose, there, upon the same day, congregated and assembled together." What do those words mean? They clearly mean, that there shall be a congregation and assemblage, as the law requires, of the mayor, aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants present. What does the law require? The law requires, that the principal burgesses, there present, shall be a majority of the definite number. But then, having made the provision that they shall all be congregated and assembled, it says, that *they*, or the greater part of *them*, as should be so congregated, might have, and should have, full power and authority, by the greater part of the voices of them, *so assembled together*, to choose and make one to be the mayor. Now, the argument is, that that is to narrow the effect of the preceding clause, which required the assembly to be that which the law considers to be a legal assembly, and that an assembly less in number than the majority of the definite body, would be

(*a*) 4 T. R. 810.

1823.

The KING v. BOWER.

sufficient. But is that the fair meaning of the clause? They are to be *so* congregated. How *so*? Why as if the former words had stood unqualified, which make it, by law, necessary that there should be a meeting of the greater part of the definite body. The word "so," as applied to the words "so congregated," and "so assembled," mean precisely the same thing. This case, therefore, comes precisely within that of *Rex* v. *Miller*. If it were intended that this charter should point out a different mode of election from that, with respect to which the case of *Rex* v. *Miller* was decided, and different from the general corporation rule, words should have been used of much more definite and explicit meaning. No such intention having been expressed, we ought to abide by the general rule.

HOLROYD, J.—I am of the same opinion. In order to render this election valid, there need not be a majority of the commonalty, but there must be a majority of the members of the definite body. Unless the meaning of the words of this charter is so clear, as to take the case out of the general rule, I think we ought not to give effect to the construction put upon them in argument. It seems to me, according to the meaning of the charter in question, there should have been a majority of the principal burgesses present, in order to render the election valid, and that it is not sufficient that the defendant should be elected by a majority of the whole elective body assembled.

BEST, J.—I agree that when once a general rule is established, we ought to endeavour to abide by it. The general rule has been clearly stated, and it appears to me, that there is nothing in this case to take it out of its operation. This case falls within the principle laid down in *Rex* v. *Bellringer*, and *Rex* v. *Miller*, and therefore judgment ought to be given for the Crown.

Judgment for the King.

DOE, d. Sir EVAN NEPEAN, Bart. v. GODDARD.

Friday, April 25.

Tenant of a manor having been originally admitted to a copyhold estate, to hold the same for the lives of *H. D.* the elder, and *H. D.* the younger, afterwards surrenders the same into the hands of the lord, and takes a re-grant of the same estate for the lives of *J. G.*, and *D. G.*, his sons, and the life of the longest liver of them *successively*, according to the custom of the manor, and pays a fine to the lord for his admittance, the grant describing him as *sole purchaser*. By the custom of the manor, when a copyhold tenement is granted to a person to hold the same for the lives of two or more other persons, and the life of the longest liver of such other persons *successively*, and the grantee dies during the life or lives of one or more of such other person or persons, without having devised the copyhold by his will, such one or more of such other person or persons so surviving the grantee, shall be entitled to hold the copyhold *successively*, as they are respectively named in the grant during his or their life or lives; but if the grantee devises the copyhold by his will, the devisee upon his death shall hold the same during the life or lives of such other person or persons so surviving. Grantee devises his copyhold estate to his eldest son, one of the cestui que vies named in the grant, who upon his father's death enters into possession of the estate:—Held, that the custom was good and valid in law, and not being inconsistent with the grant, barred the lord's right of entry.

EJECTMENT to recover the possession of a copyhold tenement, situate in the manor of *Loders* and *Bothenhampton*, in the county of *Dorset*. At the trial, before *Park*, J. at the last *Lent* Assizes for that county, a verdict was found for the plaintiff, subject to the opinion of the Court, upon the following case:—

The premises in question are a copyhold tenement within, and parcel of the manor of *Loders* and *Bothenhampton*, and demisable by copy of court-roll of the said manor. At a court-leet and court-baron of *Robert Gummer*, Esq. then lord of the said manor, there held on the 14th *October*, 1788, before *John Symes*, steward, came *Samuel Goddard*, who claimed to hold by copy of court-roll of the said manor, dated the 12th *June*, 1787, for the lives of *Henry Davie* and *Henry Davie* the younger, his son, one customary messuage or tenement, with the appurtenances, being one-half place tenement in *Bothenhampton*, in the said manor, containing eight acres, more or less; that is to say, the house and orchard about one acre; two closes of pasture, called *Ridges*, about one acre; and one close of meadow, about one acre and a-half; one close of pasture, called *East Field*, about one acre and three quarters; and one close of pasture, called *Hill*, about two acres, with common of pasture for

1823.

DOE v. GODDARD.

three cows and one horse, be the same as aforesaid, or in any other manner known or described, and according to the custom of the said manor, surrendered into the hands of the lord, all the said premises, together with the said copy of court-roll, to be cancelled, that the lord might re-grant the same in manner hereinafter mentioned. Whereupon, at the said Court, came the said *Samuel Goddard*, and retook of the lord by the delivery of his said steward the said premises, to hold the same, with the appurtenances, to the said *Samuel Goddard* for the lives of *John Goddard* and *Daniel Goddard*, his sons, and the life of the longest liver of them, successively, at the will of the lord, according to the custom of the said manor, by the yearly rent of 7*s.* and an heriot, according to the custom of the said manor, when it should happen; and by all other burthens, works, customs, suits, and services, therefore due, and of right accustomed, and for such estate and entry in the said premises so to be had, the said *Samuel Goddard, as sole purchaser,* gave to the lord a fine of 20*l.*; and so the said *Samuel Goddard* was admitted tenant thereof, and did his fealty. There is a custom in the said manor, that when a copyhold tenement within the same, is granted by copy of court-roll to any person, to hold the same to such person for the lives of two or more other persons, and the life of the longest liver of such other persons, successively, at the will of the lord, according to the custom of the said manor, and the grantee dies during the life or lives of any one or more of such other person or persons, without having devised the said copyhold tenement by his last will and testament, such one or more of such other person or persons so surviving such grantee, shall be entitled, by virtue of such grant, to take and hold such copyhold tenement, successively, as they are respectively named in such grant, during his or their life or lives respectively, at the will of the lord, according to the custom of the said manor; but if the grantee devises such copyhold tenement by his will and testament, in writing,

then, upon his death, the devisee shall be entitled to take and hold the same during the life or lives of such other person or persons so surviving as aforesaid. On the 2d *October*, 1820, the said *Samuel Goddard* died, having, by his last will and testament, in writing, devised the said copyhold tenement unto the said *John Goddard*, the defendant, (who is the first of the lives mentioned in the said grant of the said copyhold tenement), his heirs and assigns; and the defendant thereupon entered into the said copyhold tenement, and by himself, or his under-tenants, ever since has been, and still is, in possession thereof. At the Court held, on the 5th *April*, 1821, the defendant personally appeared and claimed to be admitted, but the steward of the manor wholly refused to admit the defendant. The said Sir *Evan Nepean*, the lessor of the plaintiff, at the time of the death of the said *Samuel Goddard*, was, and ever since hath been, and still is, lord of the said manor, and seised in fee thereof. The defendant entered into the common rule, and thereby confessed lease, entry, ouster, and possession, and the demise in the declaration is after the death of the said *Samuel Goddard*.

The questions for the opinion of the Court are, whether the said custom is good in law, and whether under and by virtue of such grant and custom, the defendant is legally entitled to hold the said copyhold tenement as against the lessor of the plaintiff, and his lessee, the plaintiff in the present ejectment. If the opinion of the Court shall be in the negative, the verdict is to stand; but if the opinion of the Court shall be in the affirmative, the verdict is to be set aside, and a verdict entered for the defendant.

Bankes, for the lessor of the plaintiff. The custom set forth in the case, coupled as it is with this grant, is not good in law, and consequently the defendant did not take any interest in the premises in question. It is quite clear that unless the grant is consistent with the custom, the de-

fendant, as one of the cestuys que vies, cannot take the estate. It appears from the case, that *Samuel Goddard* surrendered the grant for the lives of two other persons, previously made to him, into the hands of the lord, and took a re-grant of the estate, to hold the same for the lives of *John Goddard* and *Daniel Goddard* successively, not for their joint lives, but for the life of the longest liver of them, and for such estate, he was *the sole purchaser* by the payment to the lord of a fine of 21*l.*, and he alone was admitted tenant. By virtue of this grant it is, that the defendant claims to take an interest in the remainder. Now, the defendant is not named in the surrender, nor in the premises, nor in the habendum, nor is he proposed to the lord, nor accepted by him as tenant, either by express words, or by implication. In every respect he is a stranger to the surrenderer. He is only named as one of the cestuys que vies, and he is excluded even by words, from any participation in the payment of the fine, for it is stated, that the estate in the premises had become the property of the first taker as *the sole purchaser,* who alone is admitted as tenant of the manor. The defendant, therefore, stands simply in the situation of a party coming in under a grant to a third person, who, by express words, is declared to be *sole purchaser.* In this view of the case no argument is necessary to shew, that by virtue of such a grant as this, unsupported by custom, it would be impossible that the defendant on this record could pretend to take any interest whatever in the property. According to the custom stated in the case, not only the cestuys que vies are to take an interest in the remainder, but there may be also, as between the tenant who first takes, and the lord, another party, namely, a devisee, his heirs and assigns. Nor is this all the difficulty which appears upon the face of the case; for it is stated that *Samuel Goddard,* the first taker, surrendered this estate which he before held for the lives of *Henry Davie* the elder, and *Henry Davie* the younger. If, therefore, the custom, as stated, be good and binding, it might become a question how far it would

be competent for *Samuel Goddard* to take such a surrender as this before those former estates in the cestuys que vies, who unquestionably would have as good a right as those who claim by the subsequent grant, had been determined. It is certainly laid down in some cases, that by special custom the grantee might disappoint the cestuys que vies, in remainder, by a devise, but this must be by special custom. Now, there is no part of the custom set out in this case which provides for this state of things, because the lives in remainder are to take absolutely, unless there be a devise. The circumstance of a devise is the only exception. This observation, however, is not made for the purpose of shewing that one of the former cestuys que vies may have a better right than the defendant, but simply to shew that the parties themselves, by their own acts, did not consider that the tenant and the lord were mutually bound by grants of this nature. It is clear, from the acts of the parties, they did not consider that the cestuys que vies, named in the first grant, took an estate in remainder, because it could not be devested or taken out of the lord, without a special custom to that effect. In *Gilbert's Tenures*, 149, it is said, that the admittance of tenant for life, is an admittance of him in remainder, so as to vest the estate, but not to prejudice the lord of his fine. Assuming, that the defendant was one of the tenants in remainder, the admittance of *Samuel Goddard*, the first taker, could not vest the estate in him, otherwise than by special custom, neither is it competent without special custom, to a tenant for life, where there are others in remainder, under any circumstances, to surrender to another person, for the life of that other person. In *Watkins on Copyholds* (a), it is laid down, on the authority of a case in *Moore*, 8, pl. 27, that a surrender of copyholds is not allowed to work a wrong; therefore should *A.*, a copyholder, for life, with remainder over to another, surrender to *B.* for the life of *B.*, it will operate only as a surrender

1823.

DOE v. GODDARD.

(a) Vol. I. 98.

1823.

DOE
v.
GODDARD.

for the life of *A.*, even if a custom be shewn in favor of the surrender. This is an authority to shew that the custom in this case cannot be good, and even if it were, the acts of these parties contradict it. Admitting that custom, which is the life and soul of copyholds, may be allowed to sanction grants in almost every possible form of tenure known in the law of *England;* that it may dispense in some degree with some of those technicalities, which are required in conveyances and assurances of other descriptions of real property; and that it may be allowed to explain words of doubtful meaning on the face of a grant, yet it has never been held that custom can be allowed to insert the name of a grantee, where the grantee is not named as the person who is to take. The nature and intent of the grant must be expressed with clearness and intelligibility, but above all, the person or persons who are to hold the place of grantees, and to do homage to the lord, must be pointed out with sufficient accuracy. Custom may interpret words, or construe doubtful sentences, but cannot supply sentences or words, and least of all the names of the grantees. It has been decided, that by special custom, the words "sibi et suis" or "signatis," may create an estate of inheritance, but the word "sibi" alone could not by custom do so (*a*). In many manors, the words "sequels in right," are used for and are equivalent to "heirs." If custom is to supply the essentials of a surrender and grant, why may it not supply the surrender and grant itself? Therefore, although custom may be allowed to explain the words used in a grant, and to affix to them a different meaning from that which by law, or even in common parlance, is applied to them, yet no custom can be admitted to substitute and insert words which do not appear. In order to support the defendant's case, it must be contended, that custom will insert the names of the grantees, although they do not appear in the habendum, nor the grant. The grant here is to one who takes as *sole purchaser*, and there is nothing

(*a*) 4 Co. 29 b.

ambiguous, uncertain, or doubtful in any part of it which can be explained by custom. This is an attempt to fasten and ingraft a custom upon a grant where it appears, that nothing was meant to be conveyed, but an estate to the grantee, who takes as *sole purchaser*, and is admitted as *sole tenant*. Under such circumstances, it is impossible that any custom can be lawful which is to insert the names of those who are afterwards to take. If then the cestuys que vies are not named as takers, either expressly or by implication, they stand in the same situation as if they were not named at all. There is here no implication, because there can be no general occupancy of a copyhold. Lord *Holt*, C. J. (*a*), says, "It is very plain, that if a grant be made of a copyhold pur auter vie, upon the death of tenant for life, living cestuy que vie, there shall be no occupant, but the lord shall enter." An occupancy is for supplying the freehold, and the freehold of a copyhold, is in the lord. In *Zouch* v. *Forse* (*b*), it is said, there can be no general occupancy of a copyhold, and stat. 29 *Car.* 2. c. 3. s. 12, and 14 *Geo.* 2. c. 20. s. 9, appropriating estates pur auter vie, do not extend to copyholds; and *Blackstone*, J. (*c*) says, these statutes must not be construed so as to create a new estate, but merely to dispose of an interest in being, to which by law there was no owner. These are authorities to shew, that implications cannot favor the claimant as cestuy que vie, since the freehold is as much in the lord after the death of tenant for life, by the law of the land, as it can be under any other circumstances, and will require words as express to pass it out of him. If it is admitted that copyhold property cannot pass without a surrender, it is quite clear that no interest can pass by a grant which expresses nothing like an intention of granting, for if it does not name the grantee, it must be taken virtually as no grant at all. If, therefore, the Court shall decide, that by law such a grant as this can

(*a*) *Smartle* v. *Penhallow*, 2 Ld. Raym. 1000.

(*b*) 7 East, 186.

(*c*) 2 Com. 260.

1823.

DOE v. GODDARD.

be construed to give effect to the defendant's claim, by force of the custom stated, it will be in effect saying, that a copyhold estate may pass without a surrender or grant. In *Wright* v. *Kemp* (a), Lord *Kenyon*, C. J. says, "There is no doubt but that a surrender is considered as a common law conveyance, and is not entitled to the same favorable construction as a will; and, therefore, unless the surrender in this case has used the language which will confer a legal estate, it cannot be conferred." In *Fisher* v. *Wigg* (b), Lord *Holt*, C. J., observed, "That copyhold lands did not differ in construction of law, from freehold lands, and that as to the raising and passing estates, copyholds are to be governed by the same rule as conveyances at common law. 4 *Co.* 29 b. And as to *Brookes's* case, *Poph.* 125. *Cro. Jac.* 434. 2 *Roll. Abr.* 67. 14 *Vin.* 151, pl. 18, and the saying in *Poph.* 126, that the case of a copyhold resembles the case of a will; the report in *Cro. Jac.* 434, makes no mention of any such thing; and the said part of *Popham's Reports*, being reported by an uncertain author, ought not to be regarded." These are authorities to shew that the conveyance of a copyhold is analogous to a conveyance at common law of any other property, and must be construed by the same rule of strictness. The Court cannot construe a grant of this nature with the same freedom as a will, unless there are words upon which the construction is to attach. Therefore, to admit a custom like this to sustain the grant in question, would be directly contrary to the known principles of the common law, and upon this ground the custom stated is bad, upon the same principle, that it has been determined, that a custom for a feme covert seised in fee, to dispose of her estate without her husband joining, was held to be bad. *Stevens* and *Wife* v. *Tyrrel* (c). So, in the case already referred to, *Moore*, 8, pl. 27, a custom for barring a remainder-man by surrender of tenant for life, was held to be bad, it being contrary to the law of

(a) 3 T. R. 470. (b) 1 Ld. Raym. 622. 1 Salk. 391. (c) 2 Wils. 1.

the land, that a person should surrender an estate which is not his to transfer. If this case be decided in favor of the defendant, it will determine the contrary of this proposition, because the custom now set up is in face of the grant. It is a fixed general rule, applicable to copyholds, that the custom must be reasonable and certain. The Court will not give judgment in favor of the defendant, by force of a custom, which contains such a proposition as this, namely, that there shall be parties who are to take a beneficial estate in remainder, but subject to the will of another person, as to whether they shall take or not. In *Coke's Copyholder*, sec. 19, p. 204, it is said, that a custom which depends upon the will or pleasure of another is uncertain and void. So in *Wilkes* v. *Broadbent* (*a*) it is said, that if any part of a custom is bad, it avoids the whole. The custom must be reasonable, not involving any absurdity in itself; it must be certain, not ambiguous, indefinite, or vague. If, therefore, there is any uncertainty in this custom, it is void altogether. No doubt there are some dicta of considerable authority which will be cited on the other side, but which however are not conclusive of the present case. In *Smartle* v. *Penhallow* (*b*), *Holt*, C. J., is reported to have said, that "when a grant is made to one named in the premises, habendum to him *and his assigns* during his own life, and the lives of two others, the two cestuys que vies may take in remainder by custom, though named after the habendum; but the custom is not so found here." In that case the habendum was to one *and his assigns*, and therefore there were words used, which custom is allowed to interpret; and therefore the admittance to *A*. and his assigns would operate as the admission of the two in remainder, they being his assigns by implication or interpretation of law. The case of *Right* v. *Bawden* (*c*) is, if any thing, an authority in favor of the plaintiff. There, there was a grant of the

(*a*) 2 Stra. 1224. 1 Wils. 62.

(*b*) 2 Ld. Raym. 994. 1 Salk. 188. 6 Mod. 63.

(*c*) 3 East, 259.

1823.
Doe
v.
Goddard.

reversion to *William Bawden* the elder, for the lives of *R. Bawden* and *W. Bawden*, and for such an estate in reversion, so to be had in the said premises, the said *William Bawden* gave to the said lord a fine of 30*l.* before-hand paid, and so the said *R. Bawden* and *W. Bawden*, the grandsons, were admitted tenants in reversion. That case, as far as it goes, is favorable to the present argument, on the ground that the amount of the fine is immaterial. On these grounds, it seems quite clear, that this custom is bad. Then, lastly, as to the devise, supposing the custom itself to be good, still it is not consistent with the grant. The devise must be consistent with the custom, but nothing is said on the face of the grant respecting the power of devise. If the devise is consistent with the custom, the first taker for the lives of others, and *sole purchaser*, would have a right to devise in fee, but no lord could have consented to such a custom. The word *sole* must mean the *sole taker* of the estate. If so, that excludes the supposition of any person taking in remainder; and this shews decisively that the grant and custom are inconsistent. The devise is either consistent with the custom, or it is not. If it is not, it certainly is no good devise. By a special custom copyholder for his own life, may perhaps name his successor, but to dispose of the fee is a power which no custom could give him. The custom, therefore, is bad in every particular, and therefore the plaintiff is entitled to judgment.

C. F. Williams, contrà, was stopped by the Court.

ABBOTT, C. J.—I am of opinion that this is a good custom. This may be considered as a grant of lands and tenements to *A.* for the life of *B.* and *C.*, by which the grantor has parted with his interest, not merely for the life of *A.*, but also for the lives of *B.* and *C.*; therefore if *A.* dies, the law only says, that he who first enters shall occupy.

1823.



Doe v. Goddard.

If the grant is to *A.* and his heirs, then the heir is to take; but the lord having made such a grant as this, the question is, whether there may not be a good custom to grant such a copyhold, so as to pass the whole interest out of the lord during the lives of the two cestuys que vies. Now if it passes the whole interest during the lives of these two persons, then, according to the custom, they shall hold in succession, unless the grantee shall devise the estate. I confess I can see nothing unreasonable in such a custom. Speaking generally of it, I am clearly of opinion that it is good. It is contended that this custom cannot apply to such an estate as this, or at least that it cannot apply to the present case, because it appears that *Samuel Goddard* formerly held this estate for the lives of two other persons, namely, *Henry Davie* the elder, and *Henry Davie* the younger; and the custom finds, that if the grantee dies without making a devise, then the persons for whose lives he held shall take in succession. Now it is said, that if that custom is to be taken strictly, it will prevent the grantee from ever making a surrender. I do not see that such a consequence follows whilst he continues grantee, and it appears in point of fact that this grantee had made a surrender of the estate whilst he was seised. The last point made is, that in this particular case *Samuel Goddard* is spoken of as "sole purchaser" of the estate by payment of a fine of 21*l.* I take it, that he is the only person who has paid this money, and we are bound to presume that it was his own money, and I see no reason why a man with his own money should not buy an estate for himself. The word "successively" is not an idle word in this grant, because it is obviously applicable to a holding by persons one after the other. That word is quite unnecessary to any possession of the estate by *Samuel Goddard*, because he is to have it for the lives of two persons, and the longest liver of them. It is immaterial to him whether the word "successively" is applicable to his possession or not, because

1823.

DOE v. GODDARD.

so long as either of them lives he is to have the estate. I think the custom, speaking of it generally, is good, and there is nothing in the particular facts of this case to take it out of that custom.

BAYLEY, J.—I am of the same opinion. If it had been made out in argument that this custom would take away from the grantee the power of disposing of the property by surrender during his life, I should have thought it unreasonable, and on that ground void. But I do not consider that to be the effect of this custom. I apprehend the custom means this, that if upon such a grant as this the grantee shall not make any disposition of his property by surrender during his life, or shall not by any instrument which is to operate after his death, devise away the property, then the persons who are named successively, as the cestuys que vies, shall, in succession, take the estate; and I think the word "successively" is introduced into this grant, with reference to the custom, merely for the purpose of shewing in what manner the cestuys que vies are to take. If a copyhold is given to a man *and his heirs* during the life of *B.* and *C.*, his heirs shall be special occupants. There can be no general occupancy of a copyhold estate, and therefore the same words, if applied to a freehold, would create a general occupancy, and would devest the grantor of all interest in the estate until both the cestuys que vies were dead; but without custom they would not have such an effect upon a copyhold estate. The question then is, whether by custom, that may or may not be good; and I think the case of *Smartle* v. *Penhallow* (a) is an authority to shew that it may. It is admitted in argument, that if the words "and his assigns" were introduced into the present case, they would entitle the cestuys que vies to take in succession. Referring, however, to that case, there is really no substantial difference between that and the present. In that case there was a

(a) 2 Ld. Raym. 994.

1823.

DOE
v.
GODDARD.

grant to *A.* and his assigns, to hold to him during the lives of *B.* and *C.* He would therefore have a right to hold during the lives of *B.* and *C.*, and his assigns would, by special occupancy, be entitled to hold for the lives of *B.* and *C.* But he made no assignment. Then he made no use of the words "his assigns;" and if he made no use of those words, then it seems to me, that the case stood exactly as if the words "and his assigns" had not been mentioned. In the case of *Right* v. *Bawden* (a), the limitation was without the words "his assigns." It was simply a grant to *A.*, to hold to the said *A.* for the lives of *B.* and *C.*, and the longest liver of them successively. What did the Court say there? They did not decide that no such custom could be valid in law, but they said that without custom (inasmuch as there can be no general occupancy of a copyhold without custom, and as the grant was not framed so as to point out a special occupancy) the cestuys que vies were not entitled to take. But if there had been a custom, the Court (as far as we can collect their opinion) did not appear to entertain any doubt whatever upon the subject. The word "successively," contained in this grant, cannot be understood so as to give any sensible meaning, unless it is taken with reference to the custom in question, and it is for the convenience of the lord that there should be that description of special occupancy which the custom in this case points out. The grant is to *Samuel Goddard*, not for his own life, but for the lives of *John Goddard* and *Daniel Goddard*, his sons, and the life of the longest liver of them successively. What effect would that have had? It would have given to *Samuel Goddard* the estate to hold for his own life, provided either *John* or *Daniel* should so long live; but it would have given him no greater estate. He would have it so long as *John* or *Daniel* should respectively live. There are words to give it to him for their joint lives, and the life of the survivor. Why then is the word successively introduced?

(a) 3 East, 259.

1823.
Doe
v.
Goddard.

Not with a view to the quantum of interest which he was to take, but with this view, namely, that there should be a succession to the estate, which succession was to continue in the sons respectively. According to the argument for the plaintiff, *Samuel Goddard* only was to take, and as soon as his interest ceased by his death, though *John* and *Daniel* were both then living, still the estate must revert back again to the lord. But the word "successively," as it seems to me, can have no meaning, unless this, that as soon as *Samuel Goddard* the grantee died, then *John* and *Daniel*, if they were both living, were to take in succession. *John* was to have the estate in succession after his father's death, and, as soon as *John* died, *Daniel* was to take, if he should survive. I think the word "successively" is to be understood as qualifying the words in which this special occupancy is pointed out, and that by the custom of this manor the sons were to take as if they themselves were named in the grant. For these reasons I am of opinion that this is a good custom, and entitles *John Goddard* the defendant to hold this estate as a special occupant during his life.

Holroyd, J.—I am clearly of opinion that the custom stated in this case is good and valid in point of law. As to the argument which is applied to the wording of the custom, I think it is not tenable. I think the custom, as stated, implies no more than that if the grantee continues to fill the character of grantee, and does not make a devise before his death, the cestuys que vies are to take in succession. I think the custom does not prevent the grantee from surrendering his estate, and that this general statement of the custom applies only to a case where the grantee devises the estate, but the estate continues in him as grantee. Then the question is, whether the custom is a bad custom in its own nature. I think it can only be considered as a bad custom, upon the ground of its being unreasonable. That is the only objection upon which the argument can be

founded. But a custom to entail in the case of a copyhold estate does only that which the common law itself does in the case of freehold estates, and therefore this cannot be deemed, by law, an unreasonable custom, unless it can be said that a custom by the common law itself is unreasonable. Now if the common law custom with respect to freeholds is reasonable, there is no ground for saying that such a custom shall be unreasonable with respect to copyholds. In this case the lord has by the words of his grant expressly referred to the custom, whether reasonable or unreasonable. The word "successively" can have no meaning, unless it has reference to the custom in question. The lord therefore makes the grant with reference to the special custom. If the effect of the special custom is to make special occupants, the cestuys que vies shall become special occupants. When the lord makes a grant of the estate to be held in succession, with reference to the special custom, he must be bound by that custom, unless it is unreasonable. This custom cannot be considered unreasonable. Here the lord makes his grant with reference to an existing custom, and as the custom may be good at common law, there is no ground for considering it as unreasonable, and it is only on that ground we can hold this grant to be void.

Best, J.—If this custom to grant a copyhold estate for three lives be void, and the lord has a right to take back the estate upon the death of the first taker, though that person paid a fine upon the grant, still we should be bound to come to that decision, however we might lament the hardship of it. But I think we are not required to come to that conclusion. This custom can hardly be considered as unreasonable. Indeed it has not been argued that it is unreasonable per se, nor could it be so contended. The argument on behalf of the plaintiff is bottomed on the principle, that the custom is inconsistent; and, if that ob-

1823.

DOE v. GODDARD.

jection had been established, probably the plaintiff would have been entitled to judgment. I do not, however, think this custom is inconsistent. The grant is to *Samuel Goddard*, for the lives of *John* and *Daniel Goddard* his sons, and the life of the longest liver of them. Now it is clear from this, that the interest in the property was given entirely to *Samuel Goddard*, and that it was to continue during the lives of his two sons successively. It certainly could not be enjoyed by himself longer than his own life; but his interest is to continue during the successive lives of his two sons. Is there then any thing inconsistent in a custom which should enable the grantee to dispose of that interest in the mean time by devise or otherwise? I apprehend there is nothing in the general law of the country which renders it so; on the contrary, it is supplying a defect which appears on the face of the grant, because on the face of the grant there is no habendum to the cestuys que vies, and, without such a custom, what is to become of the property? Though this is a grant to the first taker for the lives of two other persons successively, yet there are no words which would give the estate to the cestuys que vies as grantees; but this defect is supplied by the custom of the manor. In deciding this case, we need no express authority; but if we did, it seems to me to be impossible to distinguish this in principle from *Smartle* v. *Penhallow*, which, though in its circumstances differing from the present case, is applicable to it upon the general principle there recognized. In the case of *Right* v. *Bawden* the point was decided against the grant, on the ground of the absence of a custom; but in deciding that case, the Court expressly recognized the case of *Smartle* v. *Penhallow*. It is said that these copyhold grants are to be construed most strictly, and the case of *Wright* v. *Kemp*(a) has been cited. But it is to be recollected, that that was a case between *two copyholders*, and, as between two copy-

(a) 3 T. R. 470.

holders, the rule there laid down may be applicable; but grants of this kind between copyholder and lord are to be construed most beneficially for the copyholder, and most strongly against the lord. That is the rule which applies in every case of grant; for the grant is to be taken most strongly against the grantor. The case, therefore, which has been cited has no effect upon the argument in this point of view. All the other cases cited were cases where the custom was void for uncertainty. A custom which is uncertain is no custom at all; but it is impossible to contend that this is an uncertain custom. If it is, it may be contended that the common law of the country, which says that a man's estate may descend to his heir at law, or that property may be devised so as to pass in a given course, unless that course be interrupted, is uncertain. The custom in this case is perfectly certain. The position cited from *Coke's Copyholder*, which says, "that a custom which depends upon the will or pleasure of another is uncertain and void," does not apply, because the uncertainty must be in the custom itself. That is not the case in this instance, because the custom is perfectly certain and intelligible. Here this estate is to descend to the cestuys que vies successively, unless the first taker has by devise thought proper to interrupt the course of descent. The custom provides what shall be done in such case. Therefore the objection, on the ground of uncertainty, cannot be raised. For these reasons I am of opinion, both according to law and the custom, that the lord has no right to re-enter upon this property.

Postea to the defendant.

Saturday, April 26.

The King *v.* The Inhabitants of Northwold.

At the end of a year's service in the parish of *N.*, a master being about to remove into the parish of *B.*, said to his servant, "would you like to go with me thither?" Servant said he had no objection. Master replied, "I fear you are scarcely strong enough for the work there, but try." The servant went into *B.*, and, after serving his master for six weeks, the latter asked him what wages he expected; to which he answered, "What you please." The master then said he would give him the same as the year before; with which he was satisfied, and remained in the service until *Michaelmas*, minus ten days; for which period the master deducted a proportionate amount of wages: Held, that this was a conditional hiring, and conferred a settlement on the servant.

By an order of two Justices, *William Thorpe* was removed from the parish of *Feltwell* to the parish of *Northwold*, both in the county of *Norfolk*, as the place of his last legal settlement; and, on appeal, the Sessions confirmed the order, subject to the opinion of this Court, on the following case:—

The pauper was hired for a year from *Michaelmas* to *Michaelmas*; served his master accordingly in the parish of *Northwold*, and received his wages. The day before the end of the year, the master, being then about to remove to *Brandon*, asked the pauper if he would like to go with him thither? The pauper answered that he had no objection. The master replied, that he feared that the pauper was scarcely strong enough for the work there, but he might try. The pauper then asked to go and see his friends, and returned to the master at *Northwold* the day after *Michaelmas* day. He then drove his master's team to *Brandon*, and remained in his service there, without any other hiring, for the space of six weeks, when the master asked him what wages he expected. The pauper answered, "what you please." The master replied that he would give him the same as the year before, to which the pauper assented, and continued in his service till within ten days of the next *Michaelmas*, when, on a quarrel, they parted, and the master deducted seven shillings for ten days. The question was whether the pauper was settled in *Brandon*.

Flannagan and *Dover*, in support of the order of Sessions, contended, that there was no hiring to serve for a year in the parish of *Brandon*, and therefore the pauper

1823.

The KING v. The INHABITANTS of NORTHWOLD.

was legally settled in *Northwold*. The conversation between the pauper and the master when the year's service in the latter parish was ended, clearly did not amount to a yearly hiring, and the test of this was, that at any time during the six weeks, when the pauper served in *Brandon*, the master might have turned him away without notice, and without paying him any wages, there being no contract for the payment of wages until the end of that time, and in like manner the pauper might also have left his master without notice. It could not be said that the service in *Northwold* might be connected with that in *Brandon*, so as to continue the same relation of master and servant. The contract in *Northwold* was complete and ended, before the pauper went into *Brandon*; and it was not until six weeks afterwards that any fresh contract was made. At the end of the six weeks the master clearly might have said, " you do not suit me, and therefore I shall not keep you." This proved to demonstration that there was no hiring for a year in that parish. They cited *Rex* v. *Ilam* (a), *Rex* v. *Hoddesdon* (b), and *Rex* v. *Marton* (c). Whether in fact there was a second hiring for a year, was peculiarly for the Sessions to determine. The Sessions had decided, that there was no hiring in *Brandon*, and unless the Court saw that the Sessions had come to an unreasonable conclusion, they would not disturb their decision. For this they cited *Rex* v. *Overnorton* (d), and *Rex* v. *Tyrley* (e).

H. Cooper, contrà. This is at least a conditional hiring for a year in *Brandon*, and there having been a service under it for forty days, the pauper is settled in that parish. On the day before *Michaelmas*, whilst the pauper is living with his master in *Northwold*, the master asks him if he would like to go, and live with him in *Brandon*. The pau-

(a) Burr. S. C. 304.
(b) Cald. 23.
(c) 4 T. R. 257.
(d) 15 East, 347.
(e) 4 B. & A. 624.

1823.

The King v. The Inhabitants of Northwold.

per answers, that he has no objection, and accordingly he goes into that parish with his master. At that time it is quite clear, that it was in the contemplation of the parties that the pauper should live with his master until the end of the ensuing year, and that the contract was to be impliedly governed by the terms of the preceding contract. This is clearly a good settlement according to the principle of decided cases. He cited *Rex* v. *Under Barrow and Bradley Field* (a), *Rex* v. *Ashton* (b), *Rex* v. *Croscombe* (c), and *Rex* v. *Sutton* (d).

Abbott, C. J.—I am of opinion, that there was a second hiring for a year, to serve in *Brandon*, and therefore the orders must be quashed. Just before the end of the first year, the master says to the pauper, "Will you go with me into *Brandon*?" The pauper says he has no objection. If nothing more passed, it is clear that that would be a hiring for another year. The master then says, "I am afraid you will not be strong enough for the work there, but try." The meaning of that is, "We shall contract for a year, but if, upon a little trial, I find you are not strong enough, then our contract is at an end." That is a conditional hiring. The pauper tries, is found strong enough, and resides for forty days. This is a settlement.

Bayley, J.—It is a defeasible contract for a year, and a settlement is gained.

Holroyd, J.—This is a conditional hiring for a year, the condition being, the pauper having strength enough to do the work. The contract is not in express terms for a year, but still that does not prevent a conditional hiring for a year operating (e).

Order of Sessions quashed.

(a) Burr. S. C. 548.
(b) 2 Const, 273.
(c) Burr. S. C. 256.
(d) 1 East, 656.
(e) *Best*, J., was absent.

The KING v. SUSANNAH PALMER.

Saturday, April 26.

Where the owner of a river navigation, running through fourteen different parishes, was rated to the poor of the fourteenth parish (in which the profits arising from the whole navigation were received) in respect of the whole amount of the profits: Held, that the rate was too high, and ought to have been apportioned among all the parishes through which the navigation passed.

THE defendant appealed to the Sessions against a rate made for the relief of the poor of the parish of *Fornham All Saints*, in the county of *Suffolk*. The assessment was as follows:—

"Outsetters."

Mrs. *Palmer*, a wharf and buildings, situate in *Fornham All Saints*, adjoining the river *Lark*, alias *Burn*, and occupied and used for the purposes of the navigation of the said river, and the towing paths, locks, sluices, and other works, within the said parish of *Fornham All Saints*, also occupied and used for that purpose, and the tolls arising therefrom, due at *Fornham All Saints*.	£250

The Sessions confirmed the rate, subject to the opinion of this Court on the following case:—

By an act passed 11 & 12 *Will.* 3, intituled, "An act for making the river *Lark*, alias *Burn*, navigable," *Henry Ashley*, Esq., his heirs and assigns, were empowered and authorized to make navigable the river *Lark*, otherwise *Burn*, from a place called *Long Common*, a little below *Mildenhall* mill to *Bury St. Edmunds*, and for that purpose to cleanse and open the river, and to dig and make cuts and water-courses; to erect and build sluices and bridges, and to set out and appoint towing paths and haling ways through, over, and along the ground adjoining or near to the said river, being the ground of the king or any other person or persons, first giving such satisfaction to the owners and proprietors of the said ground as certain commissioners (appointed by the act) should direct; and it was also provided, that, after such payment, the said *Henry Ashley*, Esq.,

his heirs and assigns, should have, use, and enjoy the said cuts, water-courses, bridges, sluices, towing paths, and haling ways, in as ample and beneficial a manner as if the same, by good title and sufficient conveyance in the law, had been absolutely sold and conveyed to him, his heirs and assigns. By sec. 12, the said *H. Ashley*, his heirs and assigns, were empowered to demand and receive for the freight of goods up the river, from *Mildenhall* mill to *Bury*, or down the river, from *Bury* to *Mildenhall* mill, at such place or places adjoining the said river, as he, his heirs or assigns, or their deputies or servants, should think fit, certain rates or tolls therein mentioned, and a proportionate rate or toll for any less distance. By an act of the 57 *Geo.* 3, for amending the last mentioned act, certain commissioners were empowered to direct the haling ways of the river *Lark* to be widened, and to ascertain what sum or sums of money should be paid by the proprietors of the navigation as a recompence, for the use of the lands or grounds which should be set out and directed to be taken, had, and used for such haling ways. By a private act, 41 *Geo.* 3, for inclosing the common fields and waste grounds in the parish of *Fornham All Saints*, part of which common fields and waste grounds adjoined the said river, commissioners were empowered to set out public and private roads, ditches, fences, banks, drains, and water-courses; but it was provided that they should not make, do, or execute any work, bank, drain, water-course, fence, or other thing whatsoever, which should occasion any impediment to the navigation of the river *Lark*, the overfalls, drains, and landing places, or to the haling ways or towing paths, upon or along the banks of the river, belonging to the navigation or the proprietor thereof. Provided also, that in setting out the width of the haling banks (if any should be set out) respect should be had to the soil so to be set out, and that after the same should have been separated from the remainder of the land intended to be allotted and

drained, the same should become vested in, and at all times thereafter supported and kept in repair by the owner or proprietor of the said navigation, freed and discharged from shuckage, and all rights of common. This act contained the general saving clause.

The counsel for the appellant contended, that this act was not admissible in evidence, unless it was proved that the appellant was a consenting party thereto. By the award of the commissioners certain copyhold land, situate in the said parish of *Fornham All Saints*, but distant from the line of the navigation, was allotted to the appellant under the provisions of the said act, to which she was duly admitted, and of which she has ever since been and is now in possession. The Inclosure Act was admitted, subject to the opinion of this Court. In pursuance of the Inclosure Act, the commissioners by their award, dated 22d *September*, 1804, set out and appointed, within the parish of *Fornham All Saints*, a haling way or towing path, of twelve feet, along the west side of the river *Lark*, where it had been customary and usual to hale or tow, within the same parish, for the use and convenience, and as the property of the appellant and her heirs, proprietor or proprietors, for the time being, of the navigation, and for the use and convenience of all other persons using or navigating upon the same, for the purpose of haling or towing thereon. Mr. *Ashley* the original undertaker, from whom the defendant, through her late husband, derives her title, made the river navigable from *Mildenhall* to *Fornham All Saints*, a distance of twelve miles and a-half, but it was never made navigable as far as *Bury*, nor beyond *Fornham All Saints*. This navigation extends through fourteen different parishes, and is the boundary between *Fornham All Saints* and *Fornham St. Martin's*, half of the channel to the centre thereof being in the former, and half in the latter parish; but the towing path, and the half of one sluice, and two locks, are in *Fornham All Saints*, the remaining half of the same

1823.
The King
v.
Palmer.

sluice and locks being in *Fornham St. Martin's*. The towing path is separated from the adjoining lands by a ditch. The appellant is not an inhabitant of *Fornham All Saints*, but resides in *Bury*. She is the owner under a distinct title of a wharf or coal yard, of about four acres, lying in the former parish, and adjoining to and situate at the extremity of the said navigation, in which said wharf are several warehouses and other buildings. Different portions of this wharf or coal yard are from time to time allotted by the agent of the appellant to the principal coal merchants who use this navigation, to the number of fourteen or fifteen. They pay no rent for these portions, but keep the division fences of their respective portions in repair. These different portions are varied from time to time by the agent of the appellant. Large quantities of coals are carted at once from the boats, and not deposited in the coal yard; but it is necessary for the accommodation of the wholesale dealers, using the navigation, that they should have a place whereon to deposit their goods, but the appellant is not bound to provide such place. The buildings and the outer fences, and walls inclosing the wharf, and the towing paths, locks, and sluices, are repaired by the appellant, and were erected by her or her ancestors; but it was not admitted by the appellant on the trial of the appeal, and save as aforesaid it did not appear, that all these things were repaired by her as owner of the navigation. Up to the year 1816 the appellant was rated on a rental of 17*l.* for the coal yard, and no rate was imposed upon the profits of the navigation. The annual value of the coal yard, as mere land, is not above 3*l.* Since the year 1816 up to the making the assessment appealed against, she has been rated in the parish of *Fornham All Saints* for tolls arising from the navigation and warehouses at 250*l.* per annum. The tolls becoming due and received by the appellant for goods landed in the parish of *Fornham All Saints*, equal the amount of the assessment.

Denman, C. S. and *Tindal*, in support of the rate, endeavoured to distinguish this case from *Rex* v. *Milton* (a), and *Rex* v. *The Trent and Mersey Canal Company* (b), and urged the difficulty of apportioning the rate, but the Court having intimated that the late decisions were quite conclusive of the question, the argument was abandoned.

Abbott, C. J.—I am of opinion, that the defendant has been rated too high in the parish of *Fornham All Saints*. The case of *Rex* v. *The Trent and Mersey Canal Company* is the converse of this case, nor is it distinguishable in principle from *Rex* v. *Milton*. Here the navigation runs through fourteen different parishes, and the whole is rated to the amount of 250*l.* in the parish of *Fornham All Saints*. Now, having decided that a canal is rateable in each and every parish through which it passes, it follows that this rate should have been separated into fourteen different portions, instead of being imposed entirely in one parish. If this were not so, the navigation might be rated twice over. The principle upon which this is founded, is very plain and simple. I have the utmost reverence for the learning of the Judges who decided some of the former cases upon questions of this nature, where a contrary doctrine has been held, but still of late years, the Court has been gradually coming to what is the true principle, and unquestionably the common sense of the thing, namely, that in whatever parish the land is occupied, as land covered with water, and is productive of profit to the proprietor, it is to be rated in each and every parish, according to the profit it produces, although they may not be received in that parish, but in another and a different parish. Now, this rate has not been imposed upon that principle, and, therefore, it must go down to the Sessions to be amended.

(a) 3 B. & A. 112. (b) Ante, 752.

1823.

The King v. Palmer.

Bayley, J.—I am of the same opinion. If the rate is imposed for the use of a sluice, the proprietor will have to contribute to the relief of the poor in the parish where the sluice is situated; but if it is for the use of the navigation, and for the use of land extending through a great many different parishes, each parish has a right to be paid in respect of the land on which the navigation is so used. The defendant is liable to be rated in the parish of *Fornham All Saints*, for something, but not to the extent of this rate. The Sessions must re-hear the appeal, and reduce the rate according to their discretion.

Holroyd, J., concurred.

Best, J., was absent.

Rate ordered to be amended.

W. E. Taunton and *Dover* were to have argued the case for the defendant.

Saturday, April 26.

The proprietors of a river navigation are rateable to the relief of the poor in a parish through which the navigation passes (though no riverage dues are received in such parish), in proportion to their profits upon the whole line of navigation.

The King v. The Earl of Portmore and Another.

UPON appeal against a rate made on the 15th *April* last, at two shillings in the pound, for the relief of the poor of the parish of *Woking*, in the county of *Surrey*, whereby the Earl of *Portmore* and *J. S. Langton*, Esq., were rated as proprietors of the river *Wey*, at 32*l.* 10*s.*; the Sessions confirmed the rate, subject to the opinion of this Court, upon a case.

The appellants are proprietors of the navigable river *Wey* from *Guildford* to the river *Thames*; and by an act of 22 and 23 *Car.* 2. are entitled to receive certain riverage dues upon barges and other vessels navigating the river. They

are not themselves inhabitants of the parish of *Woking*, nor are they carriers upon the river, but they grant licences under certain regulations to the owners of barges, &c. navigating the same, upon payment of certain riverage dues upon goods conveyed upon the river. The navigation of the river *Wey* extends for a considerable distance within *Woking* parish. There are in all ten locks upon the navigation, one of which called *Trig*'s lock is locally situated within the parish of *Woking*. No tolls are collected at that lock, or at any place within the parish, but the several wharfingers along the line of the navigation receive from the different barge-masters, according to certain rules laid down in 1764, an account of whatever goods are loaded or unloaded at their respective wharfs, and make an entry thereof in a book kept by each of them for that purpose. From these books they furnish quarterly to the receiver, appointed by the proprietors of the navigation, an account of the riverage, &c. due in respect of such goods, and he from these accounts makes out and delivers to the different barge-masters bills for the tonnage or riverage due from them respectively, and receives the amount thereof for the use of the proprietors. The appellants are not rateable to the relief of the poor of the parish of *Woking*, except so far as they are rateable in respect of the river *Wey*, or the locks or riverage thereof. Many tons of goods annually pass through the parish of *Woking*, to and fro, in vessels using the navigation, to different places of destination, but the goods annually landed within the parish do not yield riverage to the amount in the rate assessed. If the Court should be of opinion that the proprietors of the navigation are not rateable beyond the amount of the riverage arising from such last mentioned goods, then the rate is to be amended, by reducing the amount of the assessment on the proprietors to the sum of —*l.*; if otherwise, the rate is to stand at its present amount.

1823.

The King v. The Earl of Portmore.

C. Monro, for the defendants, was instructed to contend that they were only rateable in respect of the riverage dues, arising from the goods actually landed within the parish of *Woking*, and not in proportion to the profits arising upon the whole navigation; but after the case last decided of *Rex* v. *Palmer* (a), he felt that he could not resist the confirmation of the rate to the amount for which the appellants were assessed.

The Court said, that it was now too late to contend against the principle upon which this rate was founded.

Rate confirmed.

Cowley was to have argued in support of the rate.

(a) Ante, 793.

Saturday, April 26.

The King v. The Inhabitants of Sutton Saint Edmunds.

A pauper was hired as a labourer in husbandry to serve a farmer, under an agreement that he was to have yearly wages, and his master either to find him two cows, or provide himself with two, *and feed them on his master's farm*. The pauper bought one cow, and his master found him another, both of which were fed during the summer in his master's pasture, and, in the winter, were kept in his master's straw yard, and fed with hay grown upon the farm. The pasture and the hay feeding were respectively worth 5*l.* 5*s.* a-year:—Held, that the pauper did not gain a settlement by renting a tenement of 10*l.* value. *Aliter*, if the contract had been that the cows were to be *pasture fed*.

UPON appeal, the Sessions confirmed an order of two Justices for the removal of *Thomas Watson*, and *Mary* his wife, and their son *William*, from the hamlet of *Leverington-Parson-Drove*, in the Isle of *Ely*, to the hamlet of *Sutton Saint Edmunds*, in the county of *Lincoln*, subject to the opinion of this Court, upon the following case:—

The pauper being settled at *Sutton Saint Edmunds*, and having been married several years, at *Lady-day* in the year 1793, agreed with a farmer of the name of *John Ulyatt*,

in *Leverington-Parson-Drove*, to serve him as a confined labourer in husbandry, (that is, to work for him, and no other person) for a year. The terms of the agreement made between the pauper and his master, were as follows:— The pauper was to have 8*l.* a-year wages, his master was either to find him two cows, or the pauper was to be at liberty to provide himself with two, and feed them on his master's farm during the same year; and he was to have the further privilege of keeping two ewes on the farm during the whole year, and the running of a pig at the barn door, and in the straw yard, during the same time. The pauper went into the service of Mr. *Ulyatt*, under this agreement, at *Lady-day* 1793, and continued therein till *Lady-day* 1797, under contracts to the same effect. During the first three years of such servitude, the pauper lived in a house on his master's farm in *Wisbech High Fen*, and the last year of such service, in a cottage at *Leverington-Parson-Drove*. The occupation of the cottage was incidental to the service of the pauper, who was discharged from it at the same time he left his service. The pauper bought one cow, and his master found him another, both of which were fed during the summer, in the pasture of his master, and in the winter were kept in the straw yard of his master, and fed with hay that was grown upon the master's lands, and the pauper had the exclusive use and advantage of such cows, and he also kept two sheep and a pig on the farm during the whole year. If the pauper had not had such cows and sheep and pig kept for him on his master's farm, he would have had more wages, and at the time he left Mr. *Ulyatt's* service in 1797, he took his cow, sheep and pig with him. Evidence was given to the Court that the keep of the two cows during the summer months would require two acres and a-half of land on which they were fed, and that such acres were worth together annually 5*l.* 5*s.*, and that to cut hay sufficient for the winter keep would require two acres and a-half more of such land, of the annual value of 5*l.* 5*s.*

1823.

The King v. The Inhabitants of Sutton Saint Edmunds.

and that the summer feed and winter keep, with hay for the two cows, on such farm, were of the annual value of 10*l.* 10*s.* and that the keep of the two sheep on the farm during the year, was of the annual value of 1*l.* 6*s.*, and the keep of the pig at the barn door and straw yard, where it was fed on the produce of the land, was of the annual value of 1*l.* 19*s.* The valuation of the two cows, the two sheep and pig for the whole year, forming, together, 13*l.* 15*s.* 6*d.* The Court of Quarter Sessions did not consider that the keeping and feeding of the cows, sheep, and pig, under the above circumstances, constituted such a tenement as gave the pauper a settlement at *Leverington-Parson-Drove*, and therefore confirmed the order of removal.

Puller, in support of the order of Sessions. The pauper gained no settlement by renting a tenement within the meaning of the statute 13 & 14 *Car.* 2. c. 12, in *Leverington-Parson-Drove*. It has never yet been decided in any of the cases, that a pauper can gain a settlement under a contract to feed cows generally, and the question is, whether the agreement, as found in this case, to feed the cows, can be construed into a tenement so as to confer a settlement of the requisite value, coupled with the keep of the sheep and the run of the pig. It has been decided that a contract to feed cows generally, under which they might be fed with green tares bought in the market, would not be a tenement within the act (*a*). This was the opinion of *Lawrence*, J., and also of Lord *Ellenborough*, C. J., who said "If indeed the cow might under this contract have been fed elsewhere on grain or hay, the consequence would follow that this was not a taking of a tenement." Unless, therefore, in the present case, it can be maintained that the feed of these cows during the winter months upon hay, brought from the land to be eaten in the straw yard, and which is estimated at 5*l.* 5*s.*, can be considered as part of the tenement, the

(*a*) *Rex* v. *Tisbury*, Mich. 45 *Geo.* 3. 2 Nol. P. L. 17. 3d edition.

whole of the tenement falls to the ground, inasmuch as the feed during the summer is stated to be worth only 5*l.* 5*s.* To constitute this a tenement within the cases, the pernancy of the profits of the land must be taken by the mouths of the cattle whilst the produce is growing. Feeding with hay severed from the land is not sufficient. Here part of the feed consisted of hay, and consequently there is no tenement. If this be a tenement, it will be next contended, that sending cattle to a straw yard will be sufficient to confer a settlement. The case of *Rex* v. *Minster* (*a*), which will be relied upon on the other side, is no authority to govern the present case, because it was there conceded that the cows were fed upon *the pasture,* which was worth 10*l.* a-year, and the distinction between that case and this is, that here, during the winter, the cows were fed upon hay, which might have been gotten elsewhere if there was not sufficient grown upon the farm for the purpose. The contract here is merely personal, and cannot be construed to have any relation to the land so as to constitute a tenement. An action might be maintained for the breach of the contract for not feeding the cows, but it never can be contended that such a contract savours of the realty. In another particular this case is distinguishable from *Rex* v. *Minster,* because here one of the cows belonged to the master, but there they were hired by the pauper of a third person. In *Rex* v. *Oswabeston* (*b*) the Court decided, that the milking of a cow would not confer a settlement though fed by the owner, unless the bargain was, that she was to be *pasture fed.* That is a decisive authority upon this case, and as the contract here was not that the cows were to be pasture fed, the case is distinguishable from any hitherto decided, and therefore the Sessions did right in holding this not to be a tenement. He cited *Rex* v. *Darley Abbey* (*c*), *Rex* v. *Stoke upon Trent* (*d*), and *Rex* v. *Hollington* (*e*).

(*a*) 3 M. & S. 276.
(*b*) Mich. 1818, not reported.
(*c*) 14 East, 282.
(*d*) 10 East, 496.
(*e*) 3 East, 113.

1823.

The King v. The Inhabitants of Sutton Saint Edmunds.

Reader and *S. M. Phillips*, contrà. The case of *Rex* v. *Minster* is an express authority in point, and not at all distinguishable from the present case. Unless the Court shall decide that case to be no longer law, it must govern the present. The circumstance of one of the cows here being the property of the master makes no sort of difference, because the pauper had still the pernancy of the profits of the land by the mouths of both the cows, though they were not both his property. The case expressly finds that the cows were to be fed upon the *produce of the farm*, and it makes no difference whether they were to be kept upon grass during part of the year, and hay during the remainder, so long as the grass and the hay were the produce of the land. In *Rex* v. *Minster* there was nothing distinctly to shew that the cows were to be pasture fed and pasture fed only. The contract there was the same as here; the cows were to be fed *on the master's farm*. In *Rex* v. *Oswabeston* the contract was merely personal, and the cow might have been kept upon grains or hay bought elsewhere. Here the contract is that the cows shall be fed upon the farm, and unless therefore the Court are disposed to overturn *Rex* v. *Minster*, the pauper in this case clearly gained a settlement by renting a tenement. [*Bayley*, J. The case of *Rex* v. *Oswabeston* was the wiser decision.]

Abbott, C. J.—It has been settled in several cases that the pernancy of the produce of land by the mouths of cattle is a tenement. Any body looking at the mere words of the statute *Car.* 2, might wonder that the Court could ever have come to such a decision. Very learned Judges, however, have so decided, and their decision has been followed, and I certainly do not mean to disturb that doctrine. It follows as a consequence from that, that a contract to enjoy the produce of land, of the annual value of 10*l.*, by the mouths of cattle, is taking a tenement. I repeat that I do not mean to disturb that doctrine; but acting upon the

authority of *Rex* v. *Oswabeston*, I think the contract must be for the *growing* produce of the land, and whilst the produce remains on the land; but that after the produce is converted into hay or straw, that is not to be deemed a tenement. The contract here stated, is certainly not distinguishable from that in *Rex* v. *Minster*. In that case the contract was, that the pauper should have the feed of two cows, to be fed on the master's farm. That, probably, might be understood generally to mean, that they were to be fed with the produce of the farm in the manner in which cows are generally fed, that is, partly by the growing produce, and partly after the produce was harvested. The Court there held, that that was taking a tenement; but it is to be observed, that in that case no question was made as to the manner in which the cattle were to be fed. No distinction was there taken between the *growing* produce, and the *severed* produce. It was taken on all hands, both at the bar in argument, and by the Bench in deciding the case, that the cattle were to be fed with the growing produce; and *Le Blanc*, J., stated, in giving his judgment, that the yearly value of "*the pasture*," was so much. That case was argued entirely upon this point, namely, whether, inasmuch as the pernancy of the feed of the cows was, in respect of the service of the pauper, a part of his wages, that could be considered as taking a tenement. The whole attention of the counsel, and of the Bench, was directed entirely to that point; and if the decision of that case turns out to be wrong, because the distinction between growing and severed produce was not pointed out, we are not bound to act upon it in the present case. In this case, the distinction is clearly pointed out, by the facts which are laid before us. The case states, that the growing produce is worth so much, and the severed produce so much, distinguishing expressly one from the other. In the case of *Rex* v. *Oswabeston*, the contract was in some respects different from this. There it was for the feed of a cow, without saying "on

1823.

The King v. The Inhabitants of Sutton Saint Edmunds.

the farm," and inasmuch as it did not appear that the cow was to be *pasture fed*, the Court held, that no settlement was gained, and quashed the order. Here the contract was not for the growing produce. It was not so in words, nor was it so in fact, because the growing produce was not actually taken. I therefore think the case of *Rex* v. *Minster* ought not to govern our judgment, if the point there was improperly conceded, and the attention of the Court was not directed to it. In *Rex* v. *Oswabeston*, the attention of the Court was called to the distinction between taking the *growing crop* and the *severed crop*; and it being found here, that the growing crop was less than the value of 10*l.*, I am of opinion, that the settlement contended for, is not made out.

Bayley, J.—When this case was first presented to my mind, I was inclined to think that the cow belonging to the master, could not be taken into consideration, but upon reflection, I think it might. On the other point, however, I agree with my Lord Chief Justice, that in order to constitute a tenement by feeding cattle, the contract must be to take the growing produce of the land, and not the severed produce. According to the cases, the pernancy of the growing produce of land by the mouths of cattle, is coming to settle upon a tenement; but it would be an entire new head of settlement, by renting a tenement, if it were to be held, that the liberty to turn cattle into a straw yard, or to have them fed on hay, was sufficient. The mode of feeding the cattle in this case certainly does not constitute a tenement. They were to be fed by taking the produce of the land with their mouths in the summer time, and in the winter by feeding on hay in the straw yard. Now if the mode of feeding during the latter period could not be considered per se, as taking a tenement, it would not be taking a tenement when connected with a feeding off the growing crops of the land by the mouths of the cattle. I

am therefore of opinion, that, in this case, although the taking of the produce by the cattle when fed upon the land, may be considered as a tenement, yet when they are to be fed upon hay in the straw yard, that is not taking a tenement, and cannot be brought into account. In *Rex* v. *Minster* certainly the distinction between, what I call dry food, and green food, was not taken. It was conceded by Mr. *Bolland*, who argued against the settlement, that there was an interest issuing out of the land of the value of 10*l.*, and the Court acted upon that concession, and did not attend to the distinction which was afterwards taken in *Rex* v. *Oswabeston.* The decision in *Rex* v. *Minster*, I have reason to think produced a great deal of uneasiness and much mischief in many parts of the country, as far as it operated to the prejudice of a very meritorious class of servants, who for a considerable time had been allowed privileges of this description, and who were generally hired upon that footing, but who, after that decision, were deprived of these advantages (which, to married men, were of great importance), the occupiers of land not choosing to burthen their parishes by this mode of gaining a settlement. The effect produced by that decision drew the attention of the Court more particularly to the point there determined, and therefore when the case of *Rex* v. *Oswabeston* came before the Court, they adopted the true distinction, and said, that if the servant makes a contract that the cattle shall be *pasture fed*, then he will be considered as taking the profits of the land by the mouths of the cattle, and thereby renting a tenement of 10*l.* a-year, if the pasture be worth so much; but if he leaves the contract at large, and does not bargain that they shall be *pasture fed*, although in point of fact they are so fed, then that shall not be sufficient to confer a settlement. That was the principle upon which *Rex* v. *Oswabeston* was decided. There the pauper was to have the milk of a cow to be kept by the owner, and the value of the keep would make up the necessary value 10*l.*; but

1823.

The King v. The Inhabitants of Sutton Saint Edmunds.

the Court said, that inasmuch as it was no part of the contract that the cow should be *pasture fed*, but that the owner was at liberty to feed it otherwise than by pasture feeding, that could not be considered as a tenement. The question here is, whether pasture feeding was any part of the bargain. The only bargain was, that the master was either to find the pauper two cows, or he was to be at liberty to provide himself with two, and feed them on his master's farm. The master, therefore, was to provide feed for them; but there was no stipulation as to what species of food it was to be, and of course no bargain being made as to the species of food, it was left entirely to the discretion of the master in what manner they should be fed. The cattle were clearly not to be pasture fed summer and winter; for in the winter they would starve, unless hay was provided for their support. But hay being dry food, that cannot be taken into consideration with reference to the value of the tenement. Then inasmuch as the pasture feeding in this case does not amount to the requisite value of 10*l.*, no settlement is gained, and therefore I am of opinion that the order must be confirmed. Since the statute 59 *Geo.* 3. c. 30. this question cannot arise again.

Holroyd, J., concurred.—The right of *pasturage* for the cattle does not amount to 10*l.*, and therefore no settlement is gained(*a*).

Order confirmed.

(*a*) *Best*, J., was absent.

STANLEY *v.* DODD.

Saturday, April 26.

By a local act, 3 *Geo.* 3. for regulating the affairs of a parish, the churchwardens and overseers for the time being were directed to meet annually at *Easter* to nominate and appoint twenty discreet vestrymen, who, together with the churchwardens and overseers, were to be, and be called *Governors and Directors* of the poor. By a subsequent act, 13 *Geo.* 3. the same mode of nominating and appointing twenty discreet vestrymen was to be adopted, and it was further enacted that they, together with the churchwardens and overseers, *and all persons seised of land, &c. within the parish, of the annual value of* 80*l.*, shall be, and be called governors and directors of the poor; and by another act, 53 *Geo.* 3. reciting the previous acts, it was enacted, that the churchwardens and overseers, and thirty-two vestrymen by name, and their successors, to be nominated and appointed in the manner directed by the recited acts, *should be the Governors and Directors*:—Held, that this latter act virtually repealed the former acts; and that a governor and director by estate, within the meaning of 13 *Geo.* 3, who supplied the poor of the parish with provisions, was not liable to the penalties of 55 *Geo.* 3. c. 137. s. 6.

DEBT on the stat. 55 *Geo.* 3. c. 137. s. 6. for penalties. The first count of the declaration stated, that the defendant, being a person in whose hands the providing for, ordering, management, control, and direction of the poor of the parish of *St. Matthew, Bethnal Green,* was placed, under and by virtue of certain acts of parliament, did, in his own name, provide, furnish, and supply for his own profit, certain goods and provisions for the support and maintenance of the poor of the said parish, against the form of the statute in that case made and provided, whereby he forfeited for his offence the sum of 100*l.* &c. In seven other counts the offence was laid in like manner, only varying the description of the character in which the defendant became liable. At the trial before *Abbott*, C. J., at the *Middlesex* adjourned Sittings after last *Trinity* Term, the principal question in the cause was, whether the defendant was a governor and director of the poor, within the meaning of certain local acts of parliament for regulating the affairs of the parish of *St. Matthew, Bethnal Green,* so as to render him liable to the penalties of the statute upon which the action was founded. By 3 *Geo.* 3. c. 40. s. 11, it is enacted, that the churchwardens, overseers of the poor, and vestrymen of the parish of *St. Matthew, Bethnal Green,* shall assemble in vestry, annually, on *Tuesday* in *Easter* week, and there nominate and appoint twenty substantial and discreet persons, being vestry-men, and residing within the parish,

1823.

STANLEY v. DODD.

who, together with the churchwardens and overseers for the time being, shall be, and be called *Governors and Directors of the Poor of the Parish*, &c., which governors and directors shall, from time to time, make such regulations for the better disposition of the parish monies, as to them, or any five of them, at a meeting, shall appear necessary or expedient, &c. By 13 *Geo.* 3. c. 53. s. 6, repealing so much of the last-mentioned act as relates to the qualifications of vestry-men, it is enacted, that the rector and the churchwardens and overseers of the poor of the parish for the time being, and all and every other person or persons (resident or not resident within the parish) *who are or shall be seised or possessed of lands, &c. of the yearly value of* 80*l.* or upwards, within the parish, &c. shall be vestry-men for the time being; and by sec. 7, of the same statute, it is enacted, "that the churchwardens and overseers of the poor, and vestry-men of the parish, shall assemble in vestry, annually, on *Tuesday* in *Easter* week, and there nominate and appoint twenty substantial and discreet persons, being vestry-men, and residing within the parish, who, together with the churchwardens and overseers of the poor for the time being, *and all and every person and persons* (resident or not resident within the parish) *who are or shall be seised or possessed of lands, tenements, or hereditaments of the yearly value of* 80*l. per annum*, or upwards, within the parish, shall be, and be called *Governors and Directors of the Poor of the said Parish*. And by 53 *Geo.* 3. c. 113, s. 2, reciting the previous acts, it is enacted, "that the rector and the churchwarden and overseers of the poor for the time being, and certain persons named, being thirty-two vestry-men, inhabitant householders within the parish, and their successors, to be nominated and appointed in manner directed by the said recited acts, shall be the governors and directors of the poor, for carrying into execution the several purposes of the said last-mentioned acts, and of the provisions hereinafter contained, relating to the affairs of the

poor of the said parish." It appeared in evidence, that the defendant was a cow-keeper, residing in the parish, and was qualified by estate to be a governor and director within the meaning of the 13 *Geo.* 3. c. 50. s. 7, and had in fact qualified in the manner required by that act. In practice, it was not usual to *summon* to the meetings of the board of governors and directors, persons who were merely qualified by estate, but those only who were *nominated and appointed* governors and directors, in the manner directed by the 3 *Geo.* 3, and 13 *Geo.* 3. The offence charged against the defendant was alleged to have been committed in the year 1820, but there was no proof that in that year, he was ever summoned as one of the members of the board of governors and directors, or was an *acting governor* during that period. It appeared, however, that he occasionally attended the meetings of the governors, and dined with them after the business of the day was over, as was the practice of a great many other persons, who were governors by estate. The names of the governors and directors who attended the board for the purpose of auditing accounts, were always inserted in a book, called the governor's minute book, kept for that purpose; and in the year 1820, the defendant's name did not appear to have been entered therein. It was proved, that in that year the defendant had supplied the poor house with milk from time to time, and his accounts had been audited, and paid by an order of the governors and directors. On the part of the defendant, it was objected, first, that there was no evidence of his having acted as a governor and director; and, second, that being only a governor by estate, and not being nominated and appointed, within the meaning of the local acts, he was not liable to the penalties of the 55 *Geo.* 3, c. 137. The Jury, however, under the directions of the learned Judge, found their verdict for the plaintiff, for one penalty, with liberty to the defendant to move to enter a nonsuit.

1823.
STANLEY v. DODD.

Copley, S. G., in *Michaelmas* Term, moved for a rule to shew cause why there should not be a nonsuit entered, or why the judgment should not be arrested. In support of the first part of his motion, he made two points, first, that the defendant being only a governor and director *by estate* within the meaning of the local act 13 *Geo.* 3, was not liable to the penalties of the statute on which the action was founded, inasmuch as the 53 *Geo.* 3. c. 113. s. 2, virtually repealed the former statutes, and provided an entirely new regulation as to who should be governors and directors, and omitted altogether those persons, who by the previous statute, were, by reason of their estate, declared ipso facto, to be governors and directors; and, second, supposing this point not tenable, there was no evidence of the defendant having *acted*, or having been summoned as a governor and director, during the period in question. In arrest of judgment, he contended, that inasmuch as it appeared that the workhouse of *St. Matthew, Bethnal Green*, for which the milk in question was supplied, was not locally situated *in* the parish, the penalties of the statute did not attach. The Court granted a rule nisi in the terms moved, but intimated that there would be some difficulty in establishing the point made in arrest of judgment, for that the words, "for the use of any workhouse *in* any parish," might possibly be read, "for the use, &c. *of* any parish."

Scarlett, Gurney, and *Reader*, now shewed cause. The defendant having an estate of 80*l*. a-year in the parish, and being thereby ipso facto a governor, and having acted in the character of a governor, by attending at meetings of the governors, must be considered a governor within the meaning of the acts of parliament; and therefore, as he has supplied the poor with provisions, he is liable to the penalties imposed by the statute upon which this action is founded. The local acts are to be taken altogether, and each has a clear and explicit reference to and connection with the pre-

ceding. There is nothing in any of them to shew, that the object of the legislature was to diminish the number of the governors, and in many respects the 53 *Geo.* 3, recognises and confirms the provisions of the 13 *Geo.* 3. The real question is, whether the later has repealed the earlier act, because if it has not, the defendant is clearly liable in this action. The 53 *Geo.* 3, has never been considered by any of the parties who procured it to be passed, and who have acted under it, as a repealing statute, and there are certainly no positive or express words of repeal in it, which would have been found had such been the intention of the legislature. The 13 *Geo.* 3. c. 53. s. 7, expressly repeals that part of the 3 *Geo.* 3. c. 40. s. 11, as to the description of persons who shall be governors and directors; whereas the later act has no such clause, and so important an effect cannot be given to it by inference or construction, where the language is equivocal, and the meaning at least doubtful. The only object of the later statute is to increase the number of governors in proportion to the increase of population in the parish; and that will be wholly defeated by construing it as a repeal of the clause in the 13 *Geo.* 3, which qualifies persons to be governors and directors by estate.

Copley, S. G., *Nolan*, and *Abraham*, contrà, were stopped by the Court.

ABBOTT, C. J.—I am of opinion that the defendant cannot be considered as a governor of the poor, within the meaning of the local acts of parliament. Upon a careful review of the several provisions of these statutes, it appears that the 3 *Geo.* 3. c. 40. s. 11. empowers the churchwardens and overseers to meet at a certain time and place, and to nominate and appoint twenty resident inhabitants to be governors of the poor: and so far as this act goes, those twenty constitute the only class of persons who are capable of holding the office of governor and director. Then comes

1823.

STANLEY v. DODD.

the 13 *Geo.* 3. c. 53. s. 7, which, after reciting and repealing the former statute, enacts, that the churchwardens and overseers shall nominate and appoint twenty persons, as before, who, together with the churchwardens and overseers for the time being, *and also all persons resident or not within the parish*, who have any estate within the parish of the yearly value of 80*l.*, shall be, and be called governors and directors. Here, therefore, a new class of persons capable of holding the office is created, namely, those who have an estate in the parish of 80*l.* a-year. Then comes the 53 *Geo.* 3. c. 113. s. 2; and upon that the main question connected with this cause arises, that is to say, whether it does or does not virtually repeal the 13 *Geo.* 3, as far as respects the eligibility of persons having an estate of 80*l.* a-year in the parish; and I am of opinion that it does so repeal it. In that statute the rector is first introduced as having a share in the nomination of the governors and directors, and the second section declares, that the rector and the churchwardens and overseers for the time being, and thirty-two vestrymen named, and their successors, to be nominated and appointed in the manner directed by the previous statutes, *shall be the governors and directors* of the poor. The words "shall be *the* governors and directors" are clearly words of exclusion, and under which it is impossible to comprehend any other class of persons than those specifically named in the clause. This, therefore, appears to me to have the effect of *virtually* repealing the former clause relating to governors by estate. It would indeed have been more satisfactory if the former statute had been repealed by express words; but that is not the case; and we are left to construe and explain the last statute, by considering, from a review of all its parts, what must have been the intention and object of the legislature. Having carefully considered these points, and aiding the construction which I now put upon the statute, by the only rule which is here afforded, I am of opinion that persons having

an estate of 80*l*. a-year in the parish, are not governors within the spirit and meaning of the last act of parliament, and consequently that the defendant does not come within its operation. The rule, therefore, for entering a nonsuit must be made absolute.

BAYLEY, J.—I am of the same opinion. I think the latter statute clearly amounts to a virtual repeal of the former, so far as concerns the qualification by estate. The word "*the*" has evidently an exclusive meaning, and is precisely the same as if it had been followed by the word "*only*;" in which case there could have been no doubt upon the point. The whole frame of the clause strongly corroborates this construction; for there is no mention of, or even allusion to the governors by estate, which there certainly would have been, if it had been meant to continue them by the operation of this last statute. I have no doubt that the alteration was intentional, and, as it seems to me, for a very obvious and sufficient reason; namely, that the rector being now included in the number of the governors, the addition of the governors by estate was thought unnecessary.

HOLROYD, J.—I am of the same opinion. I think that no express words of repeal are necessary to support the construction which the Court is now giving to the 53 *Geo.* 3. c. 113. The ordinary construction of language is the proper and safe guide in such cases, and, following that, nothing can be plainer than that the governors by estate are abolished, and that the thirty-two named as the act directs are to be the only and exclusive persons to fill the office. It is to be observed also, that in no clause of the two former statutes is the word "*the*" to be found as applied to governors, which affords a very strong presumption that it is here used as a term of exclusion and specification.

1823.

STANLEY v. DODD.

BEST, J.—I fully concur in what has already been said by the Court, and I shall only add, that this construction does not appear to me to work any incongruity between the latter and the former statutes; and I cannot help thinking that this decision will be highly beneficial to the interests of the parish, by narrowing the number of those who assumed the character of governors of the poor merely for the purpose of attending the parish feasts, and confining the office to those who are best qualified and most heartily inclined to transact the business of the parish in a proper manner.

Rule absolute (a).

(a) Vide ante, vol. i. 397. *West* v. *Andrews*, ante, 184. 3 B. & A. 145. 5 Ibid. 328. 2 J. B. Moore, 187.

Saturday, April 26.

The KING v. The INHABITANTS of LAKENHEATH, in SUFFOLK.

A testator charged his manor and lands with an annuity of 20*l.* to be paid by trustees to a parish schoolmaster, to be nominated by the person or persons who, for the time being, should be entitled to the possession of the manor. In pursuance of the will, a schoolmaster was appointed, and received the annuity for seven years, during which time he had the possession of a house (rent free, but worth 10*l.* a year), which was assigned to him as his residence in the character of schoolmaster:—Held, that such residence gained him a settlement within 13 & 14 *Car.* 2, though by the terms of the will, he was liable at any time to be dismissed from the office of schoolmaster, at the will and pleasure of the donor.

ON appeal against the removal of *Herbert Bailey, Elizabeth* his wife, and their four children, from *Chippenham*, in *Cambridgeshire*, to *Lakenheath*, in *Suffolk*, the Sessions confirmed the order, subject to the opinion of this Court, on the following case:—

The pauper, *Herbert Bailey*, was settled by birth in *Lakenheath*, but had resided for the last seven years in *Chippenham*, under the following circumstances:—*Edward Russell*, Earl of *Orford*, by his will, dated 2d *March*, 1726, charged his manor of *Chippenham*, &c. with the payment of one annuity or rent-charge of 10*l.* per annum, to be paid to *Thomas Reynolds*, Esq. and the Rev. *Clement Tookie*, of

Chippenham, clerk, and their heirs and assigns, for ever, in trust, to be by them paid to the minister, churchwardens, and overseers of the poor of the parish of *Chippenham*, for the time being, to be distributed among the poor housekeepers who did not receive alms from the said parish, and also with one other annuity or rent-charge of 20*l.* per annum, to be paid to the said *Thomas Reynolds* and *Clement Tookie*, their heirs and assigns, upon trust, to be by them paid yearly, and every year, unto a person, to be, from time to time, made choice of, and nominated by the person or persons, who, for the time being, should be entitled to the manor of *Chippenham*, to officiate as school-master in the said parish, for the teaching of the children thereof, for no other reward than the said annual sum of 20*l.*, which was to be paid to the school-master, without any allowance or deduction for taxes, or otherwise, with a proviso, that the said respective school-masters, to be nominated as aforesaid, should, from time to time, be removeable, and others, from time to time, made choice of and nominated in their room, at the will and pleasure of the person and persons who, for the time being, should be entitled to the immediate possession of the said manor. Upon the death of a former schoolmaster about seven years ago, *Charles Wedge*, then the receiver of the *Chippenham* manor and estates under the Court of Chancery, considering that he had a right to appoint, offered to *John Tharp*, Esq. then residing in the manor house, the compliment of nominating another person to the situation of schoolmaster. Mr. *Tharp* accordingly nominated the pauper to be schoolmaster, under Lord *Orford's* will, which the said *Charles Wedge*, the receiver, agreed to. The pauper resided at *Chippenham* during the seven years as aforesaid, until the present order, in the house, rent free, wherein his predecessors, the schoolmasters, had resided before him, and he received the annual sum of 20*l.* during the first three years, from the said *Charles Wedge*, and afterwards from *John Tharp*, Esq. since he has

1823.

The King v. The Inhabitants of Lakenheath.

been the receiver of the *Chippenham* manor and estates. The house, and garden attached to it, were of the value of 10*l.* per annum, part of which he under-let to the parish at the annual rent of 2*l.* 2*s.* during the said seven years. The said *Charles Wedge*, during the time he was receiver (from disapprobation of the pauper's conduct) suspended payment of his salary for two years, but afterwards, at the intercession of Mr. *Tharp*, paid the whole. Mr. *Tharp* also, by reason of the pauper's misconduct, gave him notice, in *December*, 1820, to quit within a month, but afterwards allowed him to remain, which he did until his removal to *Lakenheath*. It also appeared in evidence, that a former schoolmaster, named *Robinson*, who held the situation forty-three years ago, and resided in the same house for about two years and a half, was dismissed for misconduct, in not attending regularly at church with the charity children, and upon his refusing to quit the house, he was, with his goods and chattels, forcibly turned out by two constables of the parish, the Rev. *Clement Tookie*, then clergyman of the parish, who died about twenty-five years ago, aged eighty-one, being present at the time, and aiding therein; and that about a month after *Robinson's* expulsion, one *John Creek* succeeded him in his situation, and lived in the same house. The annual sum of 20*l.* was paid to the pauper, both by *Charles Wedge* and Mr. *Tharp*, out of the *Chippenham* manor and estates, and it was allowed them in their accounts by the Master in Chancery.

Scarlett and *Nolan*, in support of the order of Sessions. Assuming that the pauper was duly appointed to the office of schoolmaster under the directions and regulations of Lord *Orford's* will, two questions arise in this case for the opinion of the Court, first, whether the annuity or salary of 20*l.* per annum, charged upon the real estates of the donor, and received by the pauper, was sufficient to confer a settlement by estate; and second, whether the pauper's re-

1823.

The King v. The Inhabitants of Lakenheath.

sidence in the house assigned him, being of the annual value of 10*l.* was sufficient, under the circumstances of the case, to gain a settlement within the meaning of 13 & 14 *Car.* 2. Both these questions are answered in the negative, by referring to the nature of the pauper's tenure. It distinctly appears, that he was removeable at any time at the will and pleasure of those who appointed him. This is one of the express conditions of Lord *Orford's* will. It follows then as a consequence, that he could not be considered as irremovable for forty days, so as to confer a settlement (*a*). This is a decisive answer to the first question; but, supposing it not to be equally conclusive as to the second, there is a further reason upon that point why no settlement was gained. The occupation of the house is connected with the pauper's service and duty as a schoolmaster, and therefore he does not stand in the relation of tenant. In a great number of cases it has been decided, that the occupation must be in the character of tenant to gain a settlement. Here the pauper had no interest whatever of his own in the tenement. The residence in the school-house was an incident to the office of schoolmaster. He was removeable from that office at the absolute will and pleasure of the lord of the manor, and if he were removed from the office, it followed as a consequence that his right to hold the tenement ceased instanter, and he might be forcibly turned out. Supposing him to be tenant at will, still he might be turned out without the formality of legal process, and there would be an end to the settlement. Upon this point *Rex* v. *The Inhabitants of Cheshunt* (*b*), is a decisive authority. The fact of the pauper having underlet a portion of the tenement at an annual rent of 2*l.* 2*s.* makes no difference in the case, because he had no other interest in the premises but what was coeval with his office, and, as soon as he was dismissed from his situation, his interest in the tenement also ceased. The mere act of letting a part of the tene-

(*a*) *Rex* v. *Uttoxeter*, Burr. S.C. 538. *Rex* v. *Stone*, 6 T. R. 295.

(*b*) 1 Barn. & Ald. 473.

1823.
The King v. The Inhabitants of Lakenheath.

ment is not conclusive, unless it can be shewn that he had a right to let it. This right is negatived by the facts of the case, and all argument on this ground must completely fail. The cases of *Rex* v. *Melkridge* (a), *Rex* v. *Minster* (b), and other similar cases are distinguishable from this, because in all those the tenements were totally disconnected with the service. Upon this distinction the opinion of *Bayley*, J., in *Rex* v. *Kelstern* (c) is quite decisive. On the other side, *Rex* v. *Owersby le Moor* (d), from the similarity of its circumstances, may be relied upon; but it is materially distinguishable from the present case. There the schoolmaster, who was entitled to the profits of a certain farm for his services, actually occupied a part of the trust estate himself under an agreement. The appointment was for life, and being irremovable by the trustees, the Court decided that the settlement was gained. On these grounds the order of Sessions must be confirmed.

Dover, contrà. The pauper gained a settlement in *Chippenham* upon both or either of two grounds; first, by the occupation of a tenement of the yearly value of 10*l.*; and, second, by receiving a rent charge of 20*l.* per annum, payable out of lands in that parish. Upon the first point the case finds that the pauper resided in the schoolmaster's house rent free for seven years, until the date of the order in question, and that during that period he underlet part of the tenement to the parish at two guineas per annum. It has been argued, that by such residence the pauper could not gain a settlement, because he was not irremovable for forty days. Supposing it could not be contended with success that the pauper gained a settlement by estate, yet it is perfectly clear that if he had a right of occupation, his title is quite immaterial. Here he had a right of occupation, and the tenement being of the annual value of 10*l.*, he is set-

(a) 1 T. R. 598.
(b) 3 M. & S. 276.
(c) 5 M. & S. 136.
(d) 15 East, 357.

tled within the meaning of 13 & 14 *Car.* 2. It is no answer to this argument that the trustees or the lord of the manor might have removed him at any time; the question is, could the parish officers have removed him, or could the magistrates upon their application have removed him? It does not follow, because his right to occupy the school was defeasible by the trustees, who might have turned him out if he did not perform his duty, that the parish officers might have removed him, and so have defeated the settlement. It is sufficient that he has the beneficial occupation, without regard to the nature of his title. *Rex* v. *All Saints in Derby* (*a*). The case of *Rex* v. *Fillongley* (*b*) seems decisive of this point. In that case the pauper lived upon a tenement of 10*l.* a year, given him out of charity, and the Court decided that he came to settle within the meaning of the statute. Can it be said that the pauper in this case had not the beneficial occupation? This is not a case of occupation merely; for the case finds that he underlet part of the tenement and received a rent of 2*l.* 2*s.* per annum. Quoad that, at least, it is clear that he was the beneficial occupier. The case of *Rex* v. *Cheshunt* was determined expressly on the ground that the occupation of the house was not in the character of tenant, but of servant. The fact of underletting distinguishes this from those cases where a servant has been allowed to reside in a house as a mode of paying his wages. Here the pauper resides not as a servant, but in the character of tenant, and he was clearly irremovable by the parish officers.

The Court stopped him.

Abbott, C. J.—I think this first point is decided by *Rex* v. *Fillongley*. We cannot consider this person as an occupier of the house in the character of servant, inasmuch as here there is no master to whom it can be predicated, he

(*a*) 5 M. & S. 90. (*b*) 1 T. R. 458.

1823.

The King v. The Inhabitants of Lakenheath.

owes any service. Whether he occupies in virtue of his appointment as schoolmaster or not, appears to me to be perfectly immaterial. He takes possession of a tenement which is found by the case to be of the yearly value of 10*l.* It does not distinctly appear to whom the house belonged, but he occupies for a considerable length of time, and I think it may be conceded that he had no right to hold the house longer than he held the office of schoolmaster; but still he comes to settle upon a tenement within the meaning of the statute of *Charles*, according to decided cases. The case of *Rex* v. *Fillongley* is decisive. There the pauper's brother said, " I will give you a close in the parish of *A.*, containing about four acres, to enjoy as long as I please, and to take it again when I please, and you shall pay nothing for it;" and it was held, that such possession, when coupled with residence, conferred a settlement. To be sure that is as strong a case in support of this as possibly can be; for, supposing the pauper to be removable at the will and pleasure of the lord of the manor, still a settlement would be gained by his residence for forty days. No authority is cited contravening this doctrine, and therefore I am of opinion that the pauper has gained a settlement by residing on this tenement under the circumstances stated.

Bayley, J.—I am of the same opinion. If the property is of the value of 10*l.*, it is not necessary the party should pay any rent for it. If he is allowed to occupy rent free, still that will be sufficient to confer a settlement. Here though the pauper may be considered as giving a part of his services for the privilege of being allowed to reside in this house, yet he holds in the character of tenant at will; and if he is allowed, with the consent of the owner of the property, to come for the purpose of permanent residence in the parish upon a tenement of 10*l.*, I think he comes to settle. He comes, not for a temporary purpose, but for a permanent residence, and I think that is the meaning of the words " to settle."

1823.

The King v. The Inhabitants of Lakenheath.

Holroyd, J.—I am of opinion that a settlement was gained by renting a tenement of 10*l.* a year. In point of law the pauper was, in the strict sense of the word, tenant at will, and was the person whom the law considers as being in the possession of the school-house, and not the lord of the manor, or the receiver of the rents of the manor. In the case of master and servant, the servant enjoys under his master either as tenant, or he has merely the use of the residence for his master's service, in which latter case the possession is considered that of the master; but it cannot be said here that the schoolmaster was the servant of the person by whom he was appointed, or enjoyed the house as a servant, unless there is something to shew that the possession of the house was retained by the donor or person appointing him. The legal and the virtual possession must be considered in him until the tenancy is put an end to by those who have a right to do so (*a*).

Order quashed (*b*).

(*a*) *Best*, J. was absent.

(*b*) Vide *Rex* v. *St. Michael's Bath*, 1 East, 288. *Rex* v. *Stockley Pomroy*, Burr. S. C. 762. *Rex* v. *Melbourne*, Id. 244. *Natland* v. *Stainton*, Id. 793. *Rex* v. *Woburn*, Id. 785; and *Rex* v. *Wivelingham*, Cald. 121.

Tuesday, April 30.

The KING v. The LORD and STEWARD of the MANOR of MEER and FORTON, in STAFFORDSHIRE.

Where, by the custom of a manor, persons not being previously customary tenants, or not dwelling in the manor, purchasing by surrender customary lands within the manor, were liable to pay a larger fine to the lord than tenants or inhabitants, and a person not being a tenant or inhabitant had purchased the equity of redemption in a customary estate, and in order to save the larger fine due in respect thereof, had subsequently become the purchaser of a smaller estate, the Court granted a mandamus to the lord and steward to admit him to the latter, and as the return thereto did not allege any act of fraud in the transaction, the mandamus was made peremptory, although the effect of admittance to the smaller estate would be to defeat the lord's claim to the fine due upon the larger estate first purchased.

THIS was a mandamus to the defendants, commanding them to hold a customary court for the manor, and receive a surrender from *John Booker* and *Mary* his wife, of a piece of copyhold land, held of and within the manor, and lately sold by the said *J. B.* to *Robert Stewart*, and thereupon grant an admittance thereto to the said *R. S.*, according to the custom of the manor. The return to the writ stated, that "within the said manor there now is, and from time whereof the memory of man is not to the contrary, there hath been, with respect to persons not being customary tenants of the said manor, or not dwelling within the same, and with respect to them only, an ancient and laudable custom used and approved of, that if any person not being a customary tenant, or not dwelling within the said manor, shall take any estate as a purchaser by surrender or otherwise of any lands or tenements customary within the said manor, that then he shall pay for his fine unto the lord of the said manor for the time being, as the lord and he can agree." The return proceeded to state, that the usual fine paid by persons, such as it had previously described, was two years value of the estate, and that persons being tenants or inhabitants had paid another and different fine. "That before the 22d of *September* last the said *R. Stewart* had become the purchaser of the equity of redemption of and in certain customary lands, &c. within the manor, being the interest of one *W. S. Littler* in the said lands, &c.; and that the said *R. S.* on or about the 27th of *September* last, caused a certain notice in writing to be delivered to," the

lord, "whereby, after reciting that he had purchased the said interest of the said *W. S. L.* in certain lands, &c. copyhold of the said manor, comprized in a surrender, made and passed at a court held for the said manor, on the 8th of *October*, 1811, by the said *W. S. L.* to *Mathew Mountford* and *Arthur Mountford*, subject to a proviso for redemption and surrender of the premises on payment by the said *W. S. L.* or his assigns on the 25th of *March*, 1822, or any subsequent 25th of *March*, during his life, on six months' previous notice, of 300*l.* to the said *M. M.* and *A. M.*, their executors, &c., he did thereby give notice that he did intend to pay off the said sum of 300*l.* on the 25th of *March*, 1822, in pursuance of the above condition." It then stated that *R. S.* had never been a tenant or inhabitant of the manor, and that the yearly value of the lands, &c. mentioned in the notice was 234*l.*, whereas the yearly value of the lands, &c. sold by *Booker* to *R. S.* was much less, they not being more than half an acre in extent, concluding thus: "that the said *R. S.* did purchase the said piece of copyhold land from the said *J. B.* after the said purchase made by him of the interest of the said *W. S. L.* in the said lands, &c. mentioned in the said notice, in order that he the said *R. S.* might be admitted to the said piece of copyhold land, and might by such admittance become a customary tenant of the said manor before he should take by surrender or otherwise the said customary lands, &c. in the said notice mentioned, and for the purpose thereby of avoiding or eluding the payment of the fine which would become due to the lord of the said manor by virtue of the custom above set forth, whenever he the said *R. S.* not being a customary tenant, &c., or not dwelling, &c., should take the estate of the said lands, &c., in the said notice mentioned, as a purchaser by surrender or otherwise, and be admitted to the same, and of depriving and defrauding the said lord of the said fine payable according to the said custom."

1823.
The King v. Meer and Forton.

Patteson, on the part of the prosecutor, now contended, that the return was insufficient upon several grounds; first, because it appeared that when Mr. *Stewart* applied to be admitted to the smaller tenement, the lord of the manor had, and still had a complete tenant to the larger tenement, and therefore had no power to compel Mr. *Stewart* to be admitted to the larger tenement at all, so long as there was a complete tenant on the rolls; second, that it did not appear that there existed any custom compelling persons to be admitted to tenements in the order in which they purchased them; third, that the interest which Mr. *Stewart* had purchased in the larger tenement was merely an option to repurchase it, contingent upon Mr. *Littler*'s living till the 25th of *March*, 1822; and therefore at the time of his applying to be admitted to the smaller tenement, it was impossible for him to be admitted to the larger tenement, or to know whether he could ever be admitted to it; fourth, because Mr. *Stewart* was by law entitled to bring himself within the custom in any manner in his power, and to be admitted, or not admitted, to any tenement which he had purchased without regard to the lord's fine; and, last, that at all events Mr. *Stewart* was entitled to be admitted to the smaller tenement; and the question therefore was, merely, as to the quantum of fine which he ought to pay, if he should hereafter be admitted to the larger tenement, which was the proper subject of an action after such admittance, and not of return to the present writ. The second point required no argument; no special custom as to the order of admittance was stated in the return, and therefore none could be presumed; in this respect therefore the return was clearly no answer to the writ. Upon the first and third points, having cited *Rex* v. *Dillington* (*a*), *Hubbard* v. *Hammond* (*b*), *Rex* v. *Hendon* (*c*), *Graham* v. *Sime* (*d*), and *Vin. Abr.* (*e*), as to the first; and *King* v. *King* (*f*), and *Doe* v.

(*a*) Freem. Rep. 496.
(*b*) 4 Co. Rep. 28 a.
(*c*) 2 T. R. 484.
(*d*) 1 East, 631.
(*e*) Vol. vi. 109. Fines, A. c.
(*f*) 3 P. Wms. 360.

Tomkins (a), as to the third, the Court desired him to confine himself to the question involved in the fourth objection, namely, whether the return contained such a plain and sufficient allegation of fraud, with respect to the fine, as afforded a legal ground for the refusal to admit the party. The insinuation in the return is, that the purchase made by Mr. *Stewart* of Mr. *Booker* was with an intention to defraud the lord of his fine; but there is no direct act of fraud alleged, such as the party can reasonably understand and prepare himself to refute; nor do the facts of the case at all support any supposition of a fraudulent intent. There is no secrecy or concealment practised by these parties, but an open and notorious purchase of a present interest in the small tenement, such as may hereafter enable the purchaser to be admitted to the larger tenement in which he had purchased a future interest, upon paying the smallest fine. What illegality or fraud is there in such a transaction, and what injury is there in effect worked to any individual thereby? It is not imputed in the return that the purchase was not a real bonâ fide purchase; nor in fact was it possible so to allege. There is then no fraud either in law or in fact, the lord has sustained no injury, and has no cause of complaint; nor is the allegation so clear and explicit as to call upon the other party to answer or refute it. Upon this short point, therefore, there can be no doubt that the return is insufficient, and the rule must be made absolute for a peremptory mandamus.

W. E. Taunton, contrà. It was impossible in such a case as this to allege any direct and positive act of fraud, because it must be admitted that the purchase of the smaller tenement was a bonâ fide purchase. But the return does allege a fraudulent object and intent, and that is sufficient to support it. It alleges that the purchase was made *for the purpose of avoiding or eluding the larger fine, and of*

(a) 11 East, 145.

1823.

The KING v. MEER and FORTON.

depriving and defrauding the lord of that fine. What language can be said to allege fraud, if these words do not? It is admitted, on the other side, that the transaction was entered into for the purpose of avoiding the larger fine. That is in effect a fraud upon the lord; the return avers that it was done for that purpose, and although the word "fraudulently" is not used as connected with the act, still the whole sentence as plainly and explicitly imputes a fraudulent motive, as it is possible for language to do. It is not competent to Mr. *Stewart* to take these objections in the present shape. The return is upon the face of it a sufficient answer to the writ, and any objection to the language of the former should have been taken in the form of an action for a false return, and cannot be raised in any other proceeding. The present mode of proceeding is in effect an admission of the truth of the charge; the fraud is not denied; therefore it is in substance admitted; this is the invariable rule in pleading, and the plain rule of common sense. It is obvious that a fraud has been committed, and the Court will not lend themselves to the maintenance and promotion of that fraud, merely because it is not alleged in quite as rude terms in the return as it might have been. As respects this point, therefore, the return is perfectly good, and the present rule must be discharged.

ABBOTT, C. J.—Upon the single point to which we have desired the arguments of counsel to be particularly addressed, I am of opinion that this return is insufficient in law. Here is a custom that a person who is not a tenant or an inhabitant of the manor, shall, upon being admitted, pay a very large fine, and that a person who is a tenant and inhabitant shall pay a much smaller fine; and the argument advanced is, that no man shall be allowed by bringing himself within the situation to which the small fine attaches, to avoid the burthen imposed by the larger, because such an arrangement is a fraud upon the lord. I am of opinion

that such an act is no fraud in law. The question indeed may very fairly arise, whether the purchase is a bonâ fide purchase, and whether the residence is an actual residence; and where it appears that either the one or the other is merely colourable and fictitious, fraud may be properly imputed. But there is no allegation of that kind in this return; it is admitted that the interest of *Littler*, and the piece of land of *Booker*, were really and bonâ fide purchased; and that being the case, it seems to me that no fraud has been practised in fact, or in law, upon the lord, and that as the return is deficient in that respect, it is no answer to the writ.

BAYLEY, J.—I entirely concur with my Lord Chief Justice. The surrenderor in this case continues tenant to the lord up to the period when admittance is claimed by Mr. *Stewart*, and remains subject to all the burthens incident to such a tenancy; and he has clearly a right to insist upon the acceptance of his surrender, and the admittance of his surrenderee. There is no fraud imputed to Mr. *Booker* and his wife, it is imputed wholly to Mr. *Stewart*. But the facts clearly shew that no fraud has been committed, and therefore the bare insinuation of a fraudulent motive cannot afford a legal answer to the claim made by the writ of mandamus. What are the facts? Mr. *Stewart* purchases, actually and bonâ fide, the equity of redemption of Mr. *Littler*, intending at some future, but indefinite period, to become the purchaser also of his legal estate; and then discovering that the immediate purchase of the legal estate in another tenement will relieve him from the payment of a heavy fine, and render him liable only to a much lighter one, he does, also fairly and bonâ fide, purchase the field from Mr. and Mrs. *Booker*. Why was he not entitled to do this? Upon what principle was he barred from availing himself of such an advantage? And how can such conduct be called a fraud? I entirely agree that it amounted to no-

1823.

The King v. Meer and Forton.

thing like fraud. But even if it did, this return is insufficient. The allegation must be direct and unequivocal, and must state an act of fraud, not merely a fraudulent motive. Nor is the party bound to submit to the insinuation conveyed by this return, and seek his remedy hereafter in an action; he may object to the return as insufficient, as he has done in the present instance. It seems to me, therefore, upon these grounds, that we have but one course to pursue, namely, to quash this return, and to grant a peremptory mandamus.

Holroyd, J.—This seems to be very clearly an honest and bonâ fide transaction of purchase and sale, made, in my opinion, for a legal and innocent purpose. At any rate it is manifest that the return does not shew with any certainty the contrary, and therefore Mr. *Stewart* is fully entitled, both in law and justice, to all the benefit that may accrue to him from the insufficiency of the return. We can do no other than treat this as an insufficient return, and make the rule for a peremptory mandamus absolute.

Rule absolute (*a*).

(*a*) *Best*, J. was absent.

1823.



CLAUGHTON *v.* LEIGH.

Wednesday, April 30.

Commissioners of bankrupt are not authorized by 5 *Geo.* 2. c. 30. s. 5. to enlarge the time for the disclosure of a bankrupt's estate beyond the time mentioned in s. 3. of the same statute, still less for an indefinite period. Therefore where a bankrupt surrendered to his commission on the 4th *February*, and the commissioners, on his prayer, enlarged the time generally in writing, for him to make a full discovery of his estate and effects, and verbally fixed the adjournment day for the 1st *April*, and in the interval the bankrupt having surrendered in discharge of bail, was detained at the suit of a creditor, the Court refused to discharge him out of custody, not being protected from arrest by the commissioners order.

THE defendant having become bankrupt, and surrendered to his commission on the 4th *February* last, but not being then prepared to make a full discovery and disclosure of his estate and effects, the commissioners, on his prayer, adjourned the meeting generally, by their written order, for that purpose, without naming any day, but verbally fixed the day for the 1st *April*. On the 12th *March*, the defendant surrendered himself into the custody of the marshal in discharge of his bail, in an action brought against him by a creditor, and on the 24th *March*, whilst remaining in custody, the plaintiff lodged a detainer against him for a debt of 10,000*l.* under which he was now held in custody, and having, on a former day, obtained a rule nisi to be discharged, on filing common bail, the question was, whether the commissioners of bankrupt had authority under the 5 *Geo.* 2. c. 30, to enlarge the time for the bankrupt's examination for so long a period as from the 4th *February* to the 1st *April*, and thereby to protect him from arrest.

G. Marriott now shewed cause. This rule was obtained under the authority of the statute 5 *Geo.* 2. c. 30. s. 5. which, it will be contended, empowers the commissioners to enlarge the period for the examination of the bankrupt to any unlimited period, and provides a protection from arrest during the interval. There are, however, two answers to this application. First, section 3, of this act, which authorises the Lord Chancellor to enlarge the time for surrendering a bankrupt, expressly limits the enlargement to fifty days; and therefore it is most improbable that the legislature intended to give the commissioners larger powers than they had previously given to the Chancellor; second, the words of section 5, do not give the unlimited power which is contended

1823.
Claughton v. Leigh.

for, but clearly refer to that limited enlargement mentioned in the previous clause. The freedom from arrest is, "for and during the said forty-two days, or such further time as shall be allowed to such bankrupt for finishing his examination, *as aforesaid.*" Now, this is evidently in reference to the former clause, and consequently the commissioners have no power to extend the protection beyond fifty days. In this case they have extended the time for the examination beyond that period, but the privilege from arrest is not co-extensive, and therefore the defendant being already in custody in another action, the plaintiff has acted in the only way open to him, namely, by lodging a detainer. In the case of *Davis* v. *Trotter* (a), it was doubted whether the commissioners had the power to enlarge the period beyond the forty-two days at all, and though it was there decided that they had such power, still it does not appear in the case that the extension is authorised beyond that given to the Great Seal. Some limit must be put to the authority of the commissioners, for if they can protect the bankrupt from arrest for so long a period as now contended for, they may protect him for ten years. This rule, therefore, must be discharged.

Abraham, in support of the rule, contended, that the clause which gave the commissioners the power to enlarge the time for the bankrupt's examination, was unconnected with and independent of that which related to the Lord Chancellor, and clearly had in view to extend the protection from arrest in an equal degree with the time for examination. The intention, he insisted, was to give a privilege from arrest until the examination was finally concluded, and therefore that the order for adjournment in this case necessarily operated as a protection to the bankrupt's person.

Per Curiam.—The question is, whether this order for adjourning the bankrupt's examination was correct, and

(a) 8 T. R. 475.

1823.

CLAUGHTON v. LEIGH.

such as conferred a privilege from arrest co-extensive with itself. It is quite clear that it was not. The fifth clause of the statute must be construed with reference to the third, and upon that construction, as well as upon sound sense and reason, the commissioners have the same power of enlarging the time as the Lord Chancellor, and no more. This adjournment being for an indefinite period, was an excess of the authority of the commissioners, was substantially bad in itself, and conferred no protection at all on the person of the bankrupt. The plaintiff therefore has acted regularly, and we are bound to discharge this rule. Any other course would lead to manifest mischief and injustice, for such a prolongation of the time for examination, coupled with a privilege from arrest, would be an encouragement to every bankrupt to put off the disclosure of his effects as long as possible, and would produce serious inconvenience to the creditors, and to public business.

Rule discharged.

NOVELLO v. TOOGOOD.

Wednesday, April 30.

Where a *British*-born subject, employed as first chorister at the *Portuguese* ambassador's chapel, with a salary, rented and occupied a house, and let part of it in lodgings, and a distress was levied on his goods for a poor-rate:— Held, that his goods were not protected by 7 *Ann.* c. 12, assuming him to be a domestic servant of the ambassador.

TRESPASS for breaking and entering the plaintiff's house and distraining his goods. Plea, Not Guilty. At the trial before *Abbott*, C. J., at the *Middlesex* adjourned Sittings after *Easter* Term, 1822, the plaintiff had a verdict with 2*l.* 16*s.* damages, subject to the opinion of the Court, upon the following case:—

The plaintiff, who is a *British*-born subject, rented and occupied a house in the parish of *St. James, Westminster*, and let a part thereof in lodgings, from the 5th *January* to the 13th *September*, 1821; on which latter day the defendant, who was collector of the poor rates of the said parish, en-

1823.

NOVELLO v. TOOGOOD.

tered the plaintiff's house, and distrained his goods under the usual distress warrant. The rate on which the distress was founded was duly made, allowed and published. The sum of 2*l.* 16*s.* for which the distress was levied was due in respect of the house for half a year's poor rate, from the 5th *January* to the 5th *July*, 1821, and was regularly demanded of the plaintiff, and payment thereof refused, before the distress was made. The plaintiff, for twenty-five years last past, has been in the service of the ambassador from the crown of *Portugal* to the late and present King of *England*, as first chorister in the chapel of his Excellency, in *South Audley Street*, which is attached to the house of the ambassador; and as such has received a salary from the ambassador, payable quarterly; but the plaintiff did not live in the ambassador's house. During all that time the plaintiff has officiated as such chorister in the said chapel twice on all *Sundays* and *Saints'* days, and *Fast* days, except on *Wednesdays* in *Lent*, when the service is performed only once a day. The *Portuguese* ambassador professes the Roman Catholic religion, and, according to the ritual of that religion, it is necessary to the due celebration of divine service that there should be a person to officiate as the plaintiff did. During the time in question the plaintiff was registered with the Secretary of State as chorister to his Excellency, and his name was affixed in the sheriff's office, in the list of persons in the service of foreign ministers. During the period for which the rate became due, the plaintiff was, and acted as prompter at the *King's Theatre*, in the *Haymarket*, and also was, and acted as a teacher of music and languages, from both which employments he derived, and still derives, pecuniary advantage. The engagement as prompter at the *King's Theatre* was absolute, and contained no exception of the times when he might be engaged as chorister in the ambassador's chapel. The question for the opinion of the Court is, whether the plaintiff is entitled to recover. If so, the verdict is to stand; otherwise a nonsuit to be entered.

Campbell, for the plaintiff. The questions in this case are, first, whether the plaintiff is a domestic servant of the *Portuguese* ambassador within the meaning of the statute 7 *Ann.* c. 12; and, second, whether a warrant of distress for levying a poor rate be such process as is mentioned in the statute; for if it be, the defendant is clearly liable to an action of trespass. The material question certainly is, whether the plaintiff is such a domestic servant as is mentioned in the statute. The facts of the case clearly shew that he is a domestic servant. He has been twenty-five years in the same capacity, namely, first chorister to the ambassador; he has performed the duties of that situation constantly in person; he has regularly received an annual salary in respect of his services; and those services are absolutely necessary to the celebration of the ambassador's religious devotions. All these facts are found by the case, and taken together, they clearly satisfy the meaning of the word "domestic," and entitle the plaintiff to the privileges conferred by the statute. It is true he did not reside in the ambassador's house; if he had resided there, this question could never have been raised; but how is the case varied by that circumstance? Residence in the ambassador's house is perfectly immaterial. The retinue of a foreign ambassador is necessarily very numerous, and it would be utterly impossible that all the servants could reside in the identical house which is inhabited by their master. This statute is merely a confirmation of the law of nations; *Blackstone* in his Commentaries so describes it (*a*), and it is so defined in all the cases upon the subject; and it is quite clear from the writers upon the law of nations, that the protection was originally intended to be given to every individual belonging to the retinue, and in any manner necessary to the dignity of the ambassador. *Vatell.* lib. 4. c. 9. ss. 104. 114. 120. *Puffendorff*, lib. 8. c. 9. s. 6. and *Van Bynkershoek*, c. 15. In *Seacomb* v. *Bowlney* (*b*) it was held, that a *chaplain* to

(*a*) Vol. i. c. 7. 255.

(*b*) 1 Wils. 20.

1823.

NOVELLO v. TOOGOOD.

an ambassador, if he performed duty, was protected by the statute; and therefore a *chorister*, being a person necessary to the due celebration of divine service, is strictly within the principle of that case. In *Triquet* v. *Bath* (a) a *secretary* was held to be within the statute, although he had never lodged in the ambassador's house, and had never received any wages, which are circumstances that rendered that case a much weaker one than the present. In *Carolino's* case (b) it was said by *Wright*, J., "that it was *formerly* thought necessary that a foreign ambassador's servant should lie in the house to entitle him to protection under the statute;" which seems to intimate pretty strongly that the rule had been there relaxed in that respect. In *Hopkins* v. *De Robeck* (c), it was said by the Court, that the words "domestic" and "domestic servant," in the statute, are only put by way of example, and a *secretary* was there held to be privileged, though his name was not registered in the office of the Secretary of State. These, indeed, are all cases of personal arrest, but there are also cases in which the statute has been treated as extending to the goods of the persons privileged. *Lockwood* v. *Coysgarne* (d), and *Fontainier* v. *Heyl* (e), were both cases of execution against the goods, and though the privilege was not allowed in either of them upon other grounds, it was admitted, that if it existed at all, it would apply to the goods as well as to the person. Therefore, upon the authority of these cases, and upon the very strong facts, which appear in favor of the plaintiff here, it seems clear that he is a person within the protection of the statute, and consequently that the distress was illegal, and he is entitled to recover the value of the goods distrained by the present action. Upon the other point, he did not think it necessary to trouble the Court, inasmuch as it would follow the first, whichever way it was decided.

(a) 3 Burr. 1478.
(b) 1 Wils. 78.
(c) 3 T. R. 79.
(d) 3 Burr. 1676.
(e) Id. 1731.

E. Lawes, for the defendant. Upon the face of this case it is manifest, that the plaintiff's employment by the *Portuguese* ambassador is merely colourable, and therefore he is not within the protection of the statute. He is a *British-born* subject, not living in his master's house, but occupying one of his own, which he lets out in lodgings; exercising an active profession as a teacher of music and languages, having a permanent and lucrative situation at the Opera House; rendering no personal or domestic service to his master, but calling himself a chorister, and upon that single ground claiming an exemption, both for his person and his goods, from all liability to payment of rates and taxes. It is said that his services in the chapel are necessary to the ambassador, but it is not explained how; that he has been twenty-five years in the situation, and has regularly received a salary; but who hired him, what is the amount of his salary, or by whom, or upon what condition it has been paid, does not appear. All these circumstances render it a case of great suspicion; but, independently of that, it is plain that the statute does not in any degree embrace *the goods of the servants* of the ambassador, and therefore this action cannot be maintained. The words of the fifth section evidently confine the privilege to the *persons* of the servants, nor is there to be found in any of the writers upon the law of nations any argument to shew that it ever extended to the *goods* of any but the ambassador himself. In *Delvalle* v. *Plomer* (a), which was an action against a sheriff for a false return of nulla bona, it was determined that the mere fact of the party against whom the process was directed, being a servant to an ambassador, did not justify the sheriff for not executing the process against the goods. This however is a subordinate and comparatively unimportant point, for the strong argument in the case, and that upon which the plaintiff must fail, is, that the pretended service to the ambassador, is not such a service as is

(a) 3 Campb. 47.

1823.

NOVELLO v. TOOGOOD.

necessary to bring the plaintiff within the operation of the statute. It is clearly a mere nominal service, in no respect rendered to the ambassador personally, and in no degree necessary either to his dignity or convenience. Now, the cases in which it has been decided that a nominal or colourable service will not suffice, are numerous; *Wigmore* v. *Alvarez* (a), *Cross* v. *Talbot* (b), *Martin* v. *Manby* (c), *Darling* v. *Atkins* (d), *Holmes* v. *Gardon* (e), and many others, some of which have been cited on the other side, but which do not carry the plaintiff's case farther. The Court will watch with anxious attention to see that this privilege is not abused, and if fraud is found in this case, the plaintiff is clearly not entitled to the protection claimed. The Court has, in several recent cases, declared that privileges of this nature are not to be extended beyond their strict and proper line. *Viveash* v. *Becker* (f), *Tapley* v. *Battine* (g), and *Lard* v. *Forrest* (h). This case does not come within the reason of the privilege, the privilege being granted for the dignity and convenience of the ambassador himself. What inconvenience or indignity can the ambassador sustain from the plaintiff being obliged to contribute to the rates of a parish in which he occupies a house, which, from its size, is unnecessary to his personal residence. The decision of the Court against him will not abridge his power of attending at the chapel, and singing as usual. The ambassador will be in no degree prejudiced, and if not, then there is an end to the only reason upon which this protection can be granted.

Campbell, in reply, re-urged his previous arguments, and contended, that the present case was within the principle of several of the cited authorities. The Court could not presume fraud, and unless fraud was manifestly shewn, there

(a) 2 Stra. 797. Fitzgib. 200.
(b) 8 Mod. 288.
(c) 1 Burr. 401.
(d) 3 Wils. 33.
(e) Cas. Temp. Hardw. 394.
(f) 3 M. & S. 284.
(g) Ante, vol. i. 79.
(h) Ante, 250.

was no sensible reason why the plaintiffs should not be entitled to the protection of the statute.

1823.
NOVELLO v. TOOGOOD.

ABBOTT, C. J.—This is an action of trespass for breaking and entering the plaintiff's house, and distraining his goods. The defendant justifies the alleged trespass under a warrant of certain justices of the peace, issued for the payment of a poor rate, assessed upon the plaintiff in respect of his occupation of a house in the parish in which he resides. It is found by the case that the plaintiff is a *British*-born subject, and rented and occupied a house in the parish of *St. James, Westminster*, and let a part thereof in lodgings. The case further finds that this person has for many years been employed as first chorister to the *Portuguese* embassy, and has also been for many years filling the office of prompter at the *Italian* Opera House, and is a teacher of music and languages. My opinion in this case is founded on this single point, namely, that this is an action for taking the goods, and not for arresting the person of the plaintiff. I shall not give any opinion whether the person of the plaintiff was or was not protected from arrest. The question arises upon an act of parliament expressed in very general terms. It enacts that all writs, whereby the person of any ambassador, or the domestic, or domestic servant, of any such ambassador, may be arrested or imprisoned, or his or their goods or chattels may be distrained, shall be deemed and adjudged utterly null and void. These expressions are certainly very comprehensive. This act, however, was made in confirmation of the common law—it is to be construed according to the principles of the common law, and in questions of this kind, I think the law of nations is to be considered as a part of the common law. I do not know how the privileges of an ambassador can be better defined (and I think the definition will agree with our own authors as well as foreign writers) than by laying it down as a principle, that they extend only to what is necessary to

1823.

NOVELLO v. TOOGOOD.

the personal convenience, the dignity, and the religion of the ambassador himself. It is our duty, however, to take care that we do not allow the rights of *British* subjects to sustain any prejudice under the pretence of a claim of privilege to which the reason of the privilege does not apply. I think the reason of the privilege does not extend to this case. I do not say it is necessary that the servant of an ambassador should live in his master's house in order to entitle him to the protection afforded by the statute. It may on many occasions be necessary, and even extremely fit, that he should have a convenient lodging or place of residence for himself out of the ambassador's house; and if these goods had been taken as a distress for a rate due in respect of such a lodging or place of residence, I should have paused a long time before I should have held that the case was not within the statute. But the facts found in this case are quite otherwise. The house is taken by this person, part of it occupied by him, and the remainder is let out in lodgings. That is not such a house as is requisite for his personal convenience, and if it is not so, it is not necessary to his master, in respect of whose convenience alone the privilege is allowed by the statute. If we were to allow the privilege in a case of this description, it might go to this length; every servant of a foreign minister, instead of living in the minister's residence, might hire some large house in this metropolis, and let out the greater part of it in lodgings, and occupy it for a considerable length of time without contributing to the public burthens of the parish, or even without paying the landlord's rent. Such an extension of the privilege would be quite absurd in itself, and not at all warranted by the reason upon which it is established. I think the reason of the privilege does not apply to this case, and I am quite sure it cannot be the wish of his excellency the *Portuguese* ambassador, or of any other foreign minister, that his servant should, under the pretext of a privilege emanating from himself, inhabit a house in this town, and let it out

in lodgings, without contributing either to the parochial or national burthens. For these reasons, I am of opinion that the defendant is entitled to judgment.

BAYLEY, J.—I am of the same opinion. The question raised in this case is not whether the person of the plaintiff is privileged from arrest, nor whether the goods distrained were necessary for his residence in the place where he dwells, assuming that it was such as his service in the employment of the ambassador required. The plaintiff claims an unqualified and an unlimited extent of protection for all his goods and chattels of whatever nature they may be. He thinks fit to take a house which in size is more than necessary for the purpose of his own residence, and he insists, that he is to be exempt from all parochial and other burthens, because he is in the service of an ambassador. If we were to sanction the exemption to that extent, we should enable him to abuse that which was not intended to be his privilege, but that of the ambassador, and the ambassador only. Holding him liable to parochial rates will work no prejudice to the ambassador. He will still be able to perform all his service; he will not be prevented from giving his attendance at the ambassador's chapel, notwithstanding he is obliged to contribute to the rates of the parish wherein he has taken a house more than necessary for his own residence. For these reasons I think the defendant is entitled to judgment.

HOLROYD, J.—I am also of opinion that the plaintiff is not entitled to maintain this action. He is a *British*-born subject, and not a person brought hither by the ambassador in his suite. But it is contended, that although he is a subject of this country, yet not only his person, but his goods, to the fullest extent, are protected, because he is employed by the ambassador in a capacity which, it is said, is that of a domestic servant. Supposing him to be a domestic ser-

1823.

NOVELLO v. TOOGOOD.

vant within the meaning of the statute, still I think his privilege does not exist to the extent claimed. The only ground of the privilege is for the sake of the ambassador, in order that he may not be prejudiced in his dignity, or otherwise, by reason of the person or goods of his servant being subjected to our laws. It is not a privilege granted in any respect whatever on account of the servant, and there is no fact stated in this case to shew, that the debt for which the warrant of distress was granted, arose from his being in the situation of a servant to the ambassador. Indeed the contrary appears; and nothing is stated to shew that the ambassador is in any degree injured by those goods being taken—that it will at all interfere with the service of the plaintiff, or will in any respect prevent his fulfilling his duties as a chorister in as full and ample a manner as if the distress had not been made. The very reason of the privilege therefore ceases, and clearly does not extend to the plaintiff's goods. The ambassador is in no degree affected either in his dignity, his convenience, or his religion by this proceeding, and consequently these goods are not protected (a).

Postea to the defendant.

(a) *Best*, J., was absent.

Wednesday, April 30.

The KING v. SAMUEL BOWER.

Payment of a fine, imposed by the bye-laws of a corporation, for refusing to accept a corporate office, does not exempt the party elected from serving the office, and he may be compelled so to do by mandamus.

ON the return to a mandamus directed to the defendant, commanding him to accept the office of a common councilman of the borough of *Lancaster*, to which he had been elected, it became a question whether the payment to the chamberlain of a fine of 5*l.*, imposed by the bye-laws of the corporation, was a sufficient excuse to the defendant for not

accepting the office; and without hearing any other questions raised on the return,

The Court said—The payment of the fine of 5*l.* does not exempt him from serving the office. The bye-law does not say that he shall *either pay the fine, or serve the office*; but if he refuses to serve, he must pay the fine, and he may be mulcted for his contempt, and compelled afterwards by the authority of this Court to serve the office. There is nothing to satisfy our minds that the payment of the fine is to exempt the defendant from serving the office. It is an offence at common law for a member of a corporation to refuse to take upon him a corporate office to which he has been appointed. Let a peremptory mandamus go.

Rule absolute.

Wightman for the crown, and *Copley*, S. G., for the defendant.

The KING v. The JUSTICES of FLINTSHIRE.

Wednesday, April 30.

A county treasurer, authorized by an order of Sessions to raise money on the credit of the county rates, obtained advances from time to time from his bankers, and died in their debt. The Sessions being satisfied that the money so advanced had been bonâ fide applied to county purposes, made an order for assessing and levying a sum of money towards the repayment of the debt, but this Court quashed the order.

UPON shewing cause against a rule for quashing an order of the *Flintshire* Sessions for assessing and levying a sum of 200*l.* 5*s.* 6*d.*, and paying the same into the hands of the treasurer of the county, the case disclosed on affidavits was this:—By an order of Sessions, a former county treasurer was authorized to borrow 1000*l.* for county purposes, on the credit of the county rates. He banked with Messrs. *Sankey* and Co., bankers of *Holywell*, who had from time to

1823.

The King v. The Justices of Flintshire.

time advanced him various sums of money. Being engaged in private speculations of his own, the treasurer became embarrassed in his affairs, and died indebted to Messrs. *Sankey* in a sum of 447*l.* 15*s.* 6*d.* Upon his death they claimed the repayment of this money out of the county rates, as money advanced for county purposes. The question was brought before the Justices in Sessions, who, after inquiring into the circumstances of the case and auditing the accounts, were satisfied that the money so advanced had been bonâ fide employed for the benefit of the county, and thought themselves bound in equity to make an order for the repayment of part of it. Accordingly the order above-mentioned was made, and the question now was, whether such an order was valid and binding.

Scarlett and *D. F. Jones* shewed cause against the rule for quashing the order, and contended, that it was competent to the Sessions to inquire into and decide upon the justice of Messrs. *Sankey's* claim, and having accordingly decided that it ought to be discharged, their order was final and conclusive.

Parke, contrà, was stopped by the Court.

Per Curiam.—We are of opinion that the order for raising this money must be quashed. The fact is, that Messrs. *Sankey* and *Co.*, by consenting to advance this money to the county treasurer, enabled him to pay bills with their money instead of paying them out of the county money, which came into his hands. If they had not advanced that money, the county would have known the extent to which the treasurer was in arrear, and they would have been enabled to call upon him for repayment, or to make up his accounts; but they enabled him to close the eyes of the county, and lull it into a state of false security. That is the real state of the case; and if we are to do justice be-

tween two litigating parties, the order for raising this money must be quashed. He who imprudently trusts another, must take the chances of his improvidence.

Rule absolute for quashing the order (a).

(a) Vide ante, vol. i. 470.

The King v. The Inhabitants of Whitchurch.

Wednesday, April 30.

A parish apprentice bound for nine years, having served for six, asked his mistress leave to go into another service, to which she consented, saying she was not against it if he could better himself. He then hired himself as a yearly servant to a master in another parish, and informed his mistress of the fact, to which she said, "Very well, I am not against it." In a few days he went to his new place, and in about a fortnight returned to his mistress for his clothes, who said she hoped he liked his new place, and he said he did:—Held, that this was not such a consent on the part of the mistress as would give the pauper a settlement under the indenture in the parish where the new master resided.

By an order of two Justices, *Joseph Pierce*, *Elizabeth* his wife, and their five children, were removed from the parish of *Drayton* to the parish of *Whitchurch*, both in the county of *Salop*. On appeal the Sessions confirmed the order, subject to the opinion of this Court upon the following case:—

The pauper, *Joseph Pierce*, by indenture, bearing date 7th *April*, 1798, was bound a parish apprentice till twenty-one years of age, by the appellant parish, to one *Margaret Dutton*, in the same parish, under which he there served her six years, when, the indenture having still three years to run, the pauper not agreeing with Mrs. *Dutton*'s foreman, asked his mistress leave to go into another service, to which she consented, saying she was not against it if he could better himself. He did not mention where he was going. The pauper accordingly went to one *Jenkinson*'s, in the parish of *Prees*, and hired himself for a year at 3*l.* 16*s.* wages. He returned and told his mistress, who said, "Very well, I am not against it." In a few days he went to his new place, and in about a fortnight returned to his old mistress for his clothes, who said she hoped he liked his new place, and he said he did. Under these circumstances he lived with *Jenkinson*, in the parish of *Prees*, for three months. The ques-

1823.

The KING v. The INHABITANTS of WHITCHURCH.

tion upon the above facts for the opinion of the Court is, whether there was such a consent given by Mrs. *Dutton* to the service of the pauper with *Jenkinson*, in the parish of *Prees*, as to give him a settlement there by service under the indentures to Mrs. *Dutton*.

Nolan, in support of the order of Sessions. The question raised in this case may be satisfactorily decided upon principle, and does not require the aid of authorities. The rule is, that there must be the full and unequivocal consent of the old master to the service with the new; no knowledge of the fact, and no implied consent will be sufficient. There is no direct consent in this case, and therefore the new service did not confer a settlement. He cited *Rex* v. *Crediton* (a), and *Rex* v. *Ashby-de-la-Zouch* (b).

Gurney, contrà. This case is within both the words and the spirit of several decided cases, in which it has been held that such a consent as that given by the mistress to this apprentice is sufficient. It is difficult to distinguish this from an express consent. Here is a general licence to quit the first service, a full knowledge when and where the pauper was removing, and a subsequent recognition of all those prior circumstances. No personal conference between the two masters is requisite; the consent of the first, and the adoption of the second, are enough. He cited *Rex* v. *Shebbear* (c), *Rex* v. *Bradstone* (d), *Rex* v. *St. Mary, Lambeth* (e), and *Rex* v. *Holy Trinity, Minories* (f).

ABBOTT, C. J.—The cases cited in support of the settlement in *Prees* are perfectly distinct in their nature and circumstances from the present. The question is, whether the second service was a service under the indenture. The

(a) 1 East, 58.
(b) 1 B. & A. 116.
(c) 1 East, 72.
(d) 2 Bott. 599.
(e) Id. 595.
(f) 3 T. R. 605.

1823.

The KING v. The INHABITANTS of WHITCHURCH.

Sessions have formed an opinion that it was not, though they have not so stated it in express terms, and I think they have come to the correct conclusion. There has been too much of subtlety and refinement introduced of late into this particular branch of settlement law, and it is time that some plain and broad rule should be adopted. There must be an express consent on the part of the first master or mistress, to which the second must be privy, and an employment by the latter, of the servant in the same capacity. What is there to shew that there is a service under the indenture in the parish of *Prees*, with the consent of the mistress, and the privity of the master? The mistress merely does not object to the pauper quitting her service, and the master does not even know that the person he hires is an apprentice, or that he has ever been in any previous employment. The contract he makes with him is not a contract of apprenticeship, but is one of a totally different nature. I am therefore of opinion that this was not a service with the consent of Mrs. *Dutton*, nor under the indentures, and consequently that no settlement was conferred.

BAYLEY, J.—We should take care not to extend this class of cases of settlement by implication or construction, which we should do if we held that this service conferred a settlement. The service must be under the indenture, with the full consent of the first master, and the full knowledge of the second. Here there is neither the one nor the other, and therefore *Rex* v. *Ashby-de-la-Zouch* decides this case. The relation between the pauper and Mr. *Jenkinson* was merely that of master and servant, and had no reference to a service by apprenticeship.

HOLROYD, J., concurred.

Order of Sessions confirmed (*a*).

(*a*) *Best*, J., was absent.

Friday, May 2.

KIRKLEY and Another, Assignees of THOMPSON *v.* HODGSON.

Sole owner of a ship, secretly mortgages three-fourth shares in her, as a security for a debt due to a creditor, and he is allowed by the latter to retain the sole possession, management, and control of the vessel, until he becomes bankrupt, and though the requisites of the registry acts had been complied with:—Held, that the whole vessel passed to the assignees under the statute 21 *Jac.* 1. c. 19. s. 11, and that trover would lie against the mortgagee, who had taken possession of the ship upon the bankruptcy of the mortgagor.

TROVER for three-fourths of a ship called *The British Queen.* Plea, Not Guilty. At the trial, before *Bayley*, J. at the last *Summer* Assizes for the county of *Northumberland*, the plaintiff had a verdict, subject to the opinion of the Court upon the following case:—

John Thompson, the bankrupt, before and at the time of executing the indenture hereinafter mentioned, was the sole owner of the ship called *The British Queen*, registered in his name in the port of *Newcastle*. The indenture bore date, and was executed by the bankrupt, on the 24th *June*, 1819, and after setting out the ship's register, witnessed, that in order to secure the sum of 2400*l.* owing by the bankrupt to the defendant, and in consideration of ten shillings paid by the defendant to the bankrupt, the latter "bargained, sold, &c. to the former, his executors, &c. all those three-fourth parts or shares of and in the said ship, &c. with the like share of the masts, &c. to the same belonging, To hold upon certain trusts, and subject to certain provisoes." It then provided, that upon re-payment by the bankrupt to the defendant of 2400*l.* with interest, upon the 24th *June*, 1822, the defendant should re-convey the shares of the ship to the bankrupt, and covenanted, that if the bankrupt should make default in the payment of the 2400*l.* or the interest, at the time specified, the defendant should have full power to sell three-fourths of the ship, and to convey the ship to the purchaser in an absolute manner. The trusts were, that in the mean time the defendant should permit the ship to be freighted by the bankrupt, and to insure the ship from time to time, to the amount of 2400*l.* in the name of the defendant, but at the expence of the bankrupt. At the

1823.

KIRKLEY v. HODGSON.

time of the execution of the indenture, the ship was absent from her port of registry, in the progress of a voyage to *North America*, but the forms prescribed by the Ship Registry Acts, as to the transfer, were all duly complied with. The defendant, at the time of making the indenture, and hitherto, has resided at *Shadwell*, in *Middlesex*. The ship returned to the port of *Newcastle*, in *July*, 1819, since which time, up to the 7th *February*, 1822, she has been constantly employed by the bankrupt in the loading and carrying coals from *Newcastle* to *London*, for his use, and on his sole account; and the bankrupt continued in the actual possession of the ship, and managed and navigated her without the interference or control of the defendant, from the time of making the indenture up to the said 7th *February*, 1822. In *December*, 1821, and in *January*, 1822, the bankrupt committed several acts of bankruptcy, and a commission of bankrupt issued against him on the 7th *February*, 1822, under which he was duly declared a bankrupt, and the plaintiffs were appointed his assignees; and upon that day, there being one year and a half of interest only due, the defendant took possession of the ship, which he has since refused to deliver up to the plaintiffs on demand. The bankrupt never in any manner parted with or disposed of the remaining one-fourth part of the ship. The question for the opinion of the Court is, whether the said three-fourth parts of the ship passed to the plaintiffs under the commission; if the Court shall be of opinion in the affirmative, the verdict to stand; otherwise, a nonsuit to be entered.

Campbell, for the plaintiffs. The question in this case depends upon the construction of 21 *Jac.* 1. c. 19. s. 11, which enacts, that if any person, at such time as he shall become bankrupt, shall, by the consent of the true owner, have in his possession, order, and disposition, any goods or chattels, whereof he shall be reputed owner, and take upon him the sale, alteration, or disposition, as owner; in

1823.

KIRKLEY v. HODGSON.

every such case the commissioners shall have power to sell and dispose of the same, for the benefit of the creditors. Now, the transaction which gave rise to the present action is clearly within both the words and the spirit of this clause. It will not be disputed, that if the whole of the ship had been transferred by the mortgage deed, the whole would, under the circumstances of the case, have passed to the assignees, and it only remains to consider whether part only, being transferred, can vary the case. The defendant here stands in the situation of a mortgagee without possession, and never having taken the possession out of the bankrupt, or vested it in himself, he is without title to the ship as against the assignees. The statute of *James* is in no degree repealed by the Registry Acts, and the compliance with the requisites of the latter will not take the case out of the operation of the former, if the bankrupt retains possession with the knowledge and consent of the purchaser. This has been decided in *Hay* v. *Fairbairn* (a), and the decision of this Court in that case was subsequently confirmed in the Exchequer Chamber (b). The only ground, therefore, on which the defendant can rest his case, is the fact that the property in one-fourth of the ship remained in the bankrupt, and did not pass to the defendant under the deed. If it could be contended upon the facts of this case that the bankrupt and the defendant were tenants in common of the vessel, then, indeed, it must be admitted that the whole property would not pass to the assignees; but if there is a separate and distinct ownership by the bankrupt of one-fourth, and by the defendant of the other three-fourths, the former retaining and exercising the full possession and disposition of the whole, with the consent of the latter, then the whole does pass to the assignees. Here the parties are not tenants in common, they are separate and distinct owners of separate and distinct shares of the vessel; the bankrupt retains the possession of the whole by the sufferance of the

(a) 2 Barn. & Ald. 193. (b) 2 Brod. & Bing. 144.

1823.

KIRKLEY v. HODGSON.

defendant, and therefore by the clear sense and meaning of the statute, the whole has become the property of the assignees; for the defendant is only mortgagee without possession, and consequently has no title as against them. *Ryall* v. *Rolle* (a). The defendant will probably rely upon *Ex parte Flyn* (b), as an authority in point, but the principle there laid down does not by any means go the length of defeating this action. There the property was an undivided property, of which the petitioners and the bankrupt were tenants in common, and the possession of the bankrupts was not "a possession, order, and disposition," within the meaning of the statute. In both these particulars, therefore, that case is perfectly distinguishable from the present. In *Caldwell* v. *Gregory* (c), which was decided upon the same grounds as *Ex parte Flyn*, such a case as the present, is expressly excepted as within the statute, for it is there said by *Thompson*, C. B. that the statute does apply, "where property has been bonâ fide assigned by the bankrupt, on good consideration, but he is still suffered to keep possession."

Parke, for the defendant. The parties are tenants in common of the ship, and that circumstance takes the case out of the statute. In order to bring a case of this description within the statute, there are two propositions which it is necessary to establish; first, that the true owner be a distinct and separate person from, and independent of, the *apparent* owner; and, secondly, that the possession of the bankrupt is such as is calculated to obtain for him a false credit. This is the construction put upon the statute by Lord *Redesdale* in *Joy* v. *Campbell* (d), in giving judgment upon the construction of the *Irish* act, 11 & 12 *Geo.* 3. c. 8. s. 9, which is framed in similar terms to the statute of *James*. The same construction was put upon it by Lord

(a) 1 Atk. 165.
(b) Id. 185.
(c) 1 Price, 119.
(d) 1 Schoales & Lefroy's Irish C. C. temp. Lord Redesdale, 328.

1823.

KIRKLEY v. HODGSON.

Hardwicke, in *Ryall* v. *Rolle*; but the present case is perfectly distinguishable from the latter. Here the bankrupt has the legal property in a fourth share of the ship, and is absolutely entitled to the possession of that share down to the moment of his bankruptcy; he assigns only three-fourth shares to the defendant. Now two persons cannot be in possession of this description property at the same time; the bankrupt is in possession of one fourth in his own right, and the defendant cannot be in possession of it himself, nor can the bankrupt be in possession of it by the defendant's sufferance. The case indeed finds, that the bankrupt navigated the vessel for his own benefit; but it does not find that he appointed the captain, nor that he effected the insurance upon her; both which acts of general ownership were found in the case of *Hay* v. *Fairbairn*. There are no circumstances in this case calculated to excite a belief that the bankrupt was the sole owner, or to obtain him a false credit in that character. The ostensible situation which the bankrupt assumed in reference to the vessel, was merely that of having the possession; and the fair inference to be drawn from that circumstance is, that he is part owner, and no more; that he has some title and interest in the ship, but not the whole. The register is the only decisive and proper proof of the real interest in the ship, and of the parties in whom it is vested; and by the register it appears distinctly that the bankrupt is the owner of one fourth, and the defendant of the other three fourths. It is indeed laid down by Lord *Hardwicke*, in *Ryall* v. *Rolle*, "that where a vendee leaves goods bought, in the possession of the bankrupt, he confides as much in the general credit of the bankrupt, as that creditor who has taken only a bond or note;" but that observation clearly applies only to a voluntary trust, and does not extend to a case where the bankrupt has a right to the possession independent of the trust reposed in him by the vendee. The present question is one of infinite importance to all part-owners of ships;

1823.

KIRKLEY v. HODGSON.

for if the claim of these plaintiffs is to be substantiated, no part-owner can be secure. It has been the practice of the court of admiralty from very remote times, under some circumstances, to take the disposition of a vessel from one part-owner, and to bestow it on another (a); but a decision in favor of the present plaintiffs must work a mischievous revolution in that practice. There are, however, several cases decisive of the defendant's title to retain his three-fourths in this case. *Gillespy* v. *Coutts* (b), and *Ex parte Flyn* (c), were both decided against the assignees upon the very ground that must govern the present case, namely, that the bankrupt and the defendant were tenants in common, and Lord *Mansfield* in *Mucklow* v. *Mangles* (d), recognises that as the governing principle of those cases, where (alluding to *Ex parte Flyn*) he says, "it was necessarily held, that the tar was not in the possession of the bankrupt; otherwise, in every case of tenancy in common with a bankrupt, the act of bankruptcy would vest the entire property of the chattel in his assignees." The case of *Caldwell* v. *Gregory* (e), is another authority for the present defendant, and indeed carries the principle now contended for farther than is necessary in reference to this action, because there the case found the bankrupt to have appeared to the world as sole owner, which certainly does not appear in the present case. [*Bayley*, J. The argument then must go, if admitted at all, to this extreme length, that when a bankrupt mortgages *all* his goods, but retains the possession, the case is within the statute; but that when he mortgages nine-tenths, it is not.] Certainly the argument does go that length, and in justice also it should be so held. The Court will not be desirous of enlarging the operation of a statute so injurious to ship-owners. [*Bayley*, J. It is clear that the bankrupt here once appeared to the world as sole owner; what is there at any

(a) Abbott on Shipping, 91.
(b) Ambler, 652.
(c) 1 Atk. 185.
(d) 1 Taunt. 318.
(e) 1 Price, 119.

1823.

KIRKLEY v. HODGSON.

subsequent time to alter that character?] The alteration of the register altered his character. The register was open to public inspection, and a view of it would at once have informed all the world of the change of ownership which had taken place.

Campbell, in reply, contended, that as the bankrupt had once been *sole* owner of the ship, and as the defendant had never taken any measures to render it notorious to the world that he was only part owner, he was to be treated as sole owner within the meaning of the statute, and consequently the whole of the property passed to the plaintiffs. He cited *Ex parte Dyster* (a), *Lingard* v. *Messiter* (b), and *Gilpin* v. *Enderby*, in error (c).

BAYLEY, J. (d).—If the decision of this question, in favor of the plaintiffs, would trench in any degree upon the doctrine laid down in *Caldwell* v. *Gregory*, the Court, constituted as it is at present, would take time to consider their judgment; but I am of opinion that this case is plainly distinguishable from that, and that it is clearly within the mischief and the spirit of the statute 21 *Jac.* 1. c. 19. s. 11. Without attending to the precise words of the statute, the object of it is to declare, that where the true owner suffers another person to remain in possession of goods and chattels, so that he has the apparent ownership, and the apparent owner becomes bankrupt, the assignees under his commission shall be entitled to take them from the true owner, and shall be at liberty to treat them in the same manner as the true owner had consented that the party should himself treat them, namely, as if they really were his goods and chattels. The effect of leaving goods and chattels in the possession of a man who is not the true owner, is to enable him to obtain a false credit. He obtains

(a) 2 Rose's Ch. C. 256 and 349.

(b) Ante, 495.

(c) Ante, vol. i. 570.

(d) *Abbott*, C. J. and *Best*, J. were absent.

1823.

KIRKLEY v. HODGSON.

credit through the medium of the true owner of the goods, and it is a principle of common justice, that the man who has enabled another to impose upon the rest of the world, should, in such case, be the only sufferer. Originally, *Thompson*, the bankrupt, was the owner of the whole of this ship; he was not only the person who did the act of registering the vessel, but he was originally the apparent and the true owner of the whole. That was the situation in which the world had a right originally to consider him. Afterwards, by what at present, I call a secret act between him and the defendant, he mortgages to the latter, not the whole, but three-fourths of the ship. The defendant does no act whatever to make it generally notorious that there had been any alteration in the ownership. The registry acts are undoubtedly complied with; but it was decided in the case referred to of *Hay* v. *Fairbairn*, and previously decided in the case of *Robinson* v. *Macdonnell* (a), that that is not to be considered as any notice to the world; for that the registry acts were made alio in tuitu, the object being not to give notice to the world, but to the government, and the government only. Making an alteration in the ship's register is considered by these determinations as much an act of secrecy, as the actual execution of the conveyance itself. If the party continued afterwards to the world, independently of the register acts, the apparent owner, that would not vary the case. It is argued, on the part of the defendant, that if this had been a conveyance, not of three-fourths of the vessel only, but of the whole, then the case would equally be within the statute; but it is said that the case is out of the statute, because it is a conveyance of part only of the vessel. See to what that argument would lead, and what mischievous consequences it would be calculated to produce. A man is originally owner of all the stock in trade in his shop or warehouse, and he assigns ninety-nine out of a hundred parts to a creditor, in order that the cre-

(a) 5 M. & S. 228.

1823.

KIRKLEY v. HODGSON.

ditor may be secure of his debt, and then he remains in possession of the whole, and he says, "I have a right to remain in possession of the whole, and the case is not within the statute, because in consequence of my assignment, I am tenant in common with you. The possession can only be in one of us, and therefore I have as much right to the possession as you have, and though a conveyance of the whole would have been within the statute, yet as the conveyance reserves but a small portion of it, the statute does not attach." I think that is a proposition which cannot be maintained; and I am of opinion that the distinction attempted to be taken, between the case where the party conveys the whole, and certain definite aliquot parts of the whole, cannot be supported, if we look to the mischiefs which the statute was intended to prevent. It is said that the bankrupt is entitled to retain the possession. So he may; and if the person to whom the assignment is made takes care to make it notorious that there has been a change in the ownership, and that the party who was originally the owner of the whole ceased so to be, and remained owner only of a smaller part, then the mischief of the statute of *James* would be obviated; but if he allows the man who has one-fourth only to continue the apparent owner of the other three-fourths, the case is as much within the statute as if the assignment had been of the whole, and he allowed him to continue apparent owner of the whole. The different aliquot parts of a ship, in respect of the property, may be considered as distinct subjects; but suppose I have one-fourth, and another person has three-fourths, if I allow him to appear to the world as if he were the owner of the whole, I allow him to obtain credit to the extent of the whole. The cases which have been referred to on the part of the defendant, do not seem to me, in any respect, to bear out the argument contended for. The case decided by Lord *Redesdale* of *Joy* v. *Campbell*, is clearly distinguishable from this. In order to bring a case within the statute,

1823.

KIRKLEY v. HODGSON.

the party must continue the apparent owner with the consent of the true owner at the period when the bankruptcy attaches. In that case one of the copartners of a trading firm put his brother into possession of certain shares in the concern, as trustee, and by his will made him residuary legatee, and also his executor. Who was the true owner of the shares? The true owner was the cestui que trust, and the brother united in himself at the same time the two characters of trustee and executor, and from that time he continued to hold the shares not wholly in his previous character of trustee, but in his character of executor. The two characters united in one and the same person; and unless from that time he had continued to hold in his character of executor, there would have been no other person who could claim the property. That case, therefore, seems to me to depend upon this plain and intelligible principle, namely, that as soon as the cestui que trust died, the person put in possession as trustee became executor; and he held the goods in that and no other character; and at the period of his bankruptcy he could not be considered as holding the goods as a general trader. The case of *Ex parte Flyn* is plainly distinguishable from the present. The tar there was upon the quay at *Liverpool*, and before it got into the warehouse of *Matthews* the bankrupt, it became the joint property of the petitioners and himself, and though when deposited in *Matthews*'s warehouse it became apparently his property, yet he had not an interest in the whole; and that seems to me to be the proper ground upon which that case ought to be decided; not upon the ground that the bankrupt had the custody only, with a view to a particular division of the property, but that before he obtained any credit upon the tar, and before it got into his warehouse, he was not the sole owner, but owner to the extent of one-third only. Put that case differently, and see whether the same conclusion should be deduced from it. Suppose *Matthews*, being sole owner of the tar, had secretly sold two-thirds of it to

another person, upon a contract that it should remain still in his possession until it could be shipped, and in the mean time, before it was shipped, he became bankrupt, would the same conclusion follow? I think the decision of the Court in that case would conclude nothing upon that state of facts, because, under such circumstances, I take it to be clear, that if the party who had originally the ownership of the whole property, and who had the apparent ownership continuing in him down to the period of his bankruptcy, the case would be within the statute. That is the ground on which the case of *Mucklow* v. *Mangles* was decided by Lord *Mansfield*. It is upon the same principle also that *Thompson*, C. B., for whose judgment no man living can entertain a higher respect than myself, decided the case of *Caldwell* v. *Gregory*. To whom did the bricks in that case originally belong? Were they ever the sole and separate property of the bankrupt? If they had been, I admit that that case would be a powerful authority in opposition to the opinion which I entertain upon the present case. But it may be collected from that case that they were bricks made during the period of the partnership, and that constitutes a plain distinction between that case and the present. In the case of *Gillespie* v. *Coutts* no question arose upon the statute of *James*; and therefore it does not bear upon the present question. My opinion, on the present occasion, is founded upon these grounds, namely, that *Thompson*, the bankrupt, was originally the sole owner of the vessel; that it was notorious to the world he was so; and that no act was done by the defendant to prevent that notoriety continuing down to the period of the bankruptcy. I think that, inasmuch as the defendant allowed the apparent ownership to remain in *Thompson* down to the time of his bankruptcy, the assignees have a right to say, that the apparent ownership so continuing gives them a right to claim these three-fourths of the ship, because he who was the true owner had allowed the bankrupt to remain to all the world the appa-

rent owner. For these reasons, I am of opinion that the plaintiffs are entitled to judgment.

HOLROYD, J.—I am of the same opinion. I think that, inasmuch as the defendant suffered the bankrupt to continue in the actual possession down to the time of his bankruptcy, the case is within the statute. It has been decided that a ship is within the statute of *James* as well as other personal property. This case falls precisely within the words and the principle of the statute, and unless a distinction can be made between a conveyance of the whole and of part, there is nothing to prevent the operation of the statute, where the party is in the actual possession of the whole. The possession, then, is a possession in fact. If a person who becomes the real owner of an undivided part of a chattel, and suffers the actual possession of the whole to remain in the other part owner, the case comes within the act of parliament, and upon that principle not only the fourth share of this vessel, but the other three-fourths come within its very words. Here the defendant permits the bankrupt to continue to have the actual possession, not only of the share which remains in him, but likewise of those shares conveyed to the defendant. The mischief which it was the object of the act to remedy, was to prevent a person obtaining a false credit by means of an apparent ownership with the consent of the true owner, who suffers the actual possession to remain in him. This case is within the mischief, and I think must be considered within the words of the act. This case does not trench upon any others which have been decided. I do not think it necessary to make any further observations after the elaborate judgment of my Brother *Bayley*. It is sufficient for me to say, that I concur with him entirely in opinion, that the plaintiffs are entitled to judgment.

Postea to the plaintiffs.

On a subsequent day *Parke* applied for leave to have the case argued a second time, but *Bayley*, J., said that the case

1823.

KIRKLEY v. HODGSON.

having been mentioned to the Lord Chief Justice, who concurred in the propriety of the decision, and as *Holroyd*, J., and himself, saw no reason for altering their opinion, no advantage would be gained by a second argument, and therefore it was refused.

Saturday, May 3.

The KING v. AMBROSE JEFFERY.

By 7 & 8 *W*. 3. c. 6. a summary remedy is given before two Justices for the recovery of small tithes, under the value of 40*s*. [increased to 10*l*. by 53 *Geo*. 3. c. 127. s. 4.]; by s. 7, which gives an appeal to the Sessions, the certiorari is taken away, "unless the *title* of the tithes should be in question;" and by s. 8, if any person complained against for subtracting tithes, should insist before two Justices, upon any prescription, composition, or modus decimandi, agreement, or *title*, in order to free himself from the tithes claimed, and deliver the same in writing to the Justices, subscribed by him, and should give the party complaining security, to the satisfaction of the Justices, to pay all costs and damages, as upon a trial at law, to be had for that purpose in any superior court, should be given against him; in case the prescription, &c. should not upon such trial be allowed, in such case the Justices should forbear to give any judgment of the matter, and the party complaining should be at liberty to prosecute him for the subtraction in any Court in which he might have sued before the act. *Quære*, Whether by this act the Justices have jurisdiction to try a modus decimandi? At all events, where, after summons and appearance, two Justices made an order under this statute upon a defendant to pay the value of certain small tithes, and upon the trial of an appeal against the order, the defendant then, *for the first time*, offered evidence of a modus decimandi, which was rejected:—Held, that the Sessions did right, and that if the defendant meant to avail himself of a modus as ground of defence, he was bound to submit his evidence to the two Justices in the first instance.

BY an order of two Justices, the defendant was, under 7 & 8 *Will*. 3. c. 6, and 53 *Geo*. 3. c. 127, directed to pay to *William Warner*, the lessee of the tithes of the parish of *Glemsford*, in the county of *Suffolk*, the sum of 6*l*. for his tithes of milk and calves arising in the said parish, and due to the said *William Warner*, together with his costs and charges. The Sessions on appeal confirmed the order, subject to the opinion of this Court upon the following case:—

The respondent having proved the notice, summons, and order, and his title as lessee, and that the value of the tithes was of the amount demanded, the appellant claimed to be exempted from the payment of the said tithes, on the ground of a modus which covered it, and tendered evidence of the existence of such modus, but the Court rejected the evidence, being of opinion that they had no

power to try the question. The defendant had not offered any evidence of the modus when the case was heard before the Justices by whom the order was made. The question for the opinion of the Court is, whether the Sessions, under the above circumstances, properly rejected the evidence of a modus.

H. Cooper, in support of the order of Sessions, having intimated that he meant to rely on two points, first, that the Sessions had no jurisdiction to try a modus; and, second, supposing they had, yet inasmuch as the defendant had offered no evidence of a modus before the Justices, by whom the order was first made, the Sessions exercised a sound discretion in rejecting the evidence, the Court called upon

Storks, contrà. The question in this case arises upon the construction of 7 & 8 *Will.* 3. c. 6, which gives a summary jurisdiction to two Justices against persons for not setting out tithes where the amount claimed does not exceed 40*s.*, which act is extended by 53 *Geo.* 3. c. 127. s. 4. to cases where the amount claimed does not exceed 10*l.* By sec. 7, of the first act, an appeal is given to the Sessions, to whom power is given to confirm the judgment of the first two Justices, and award costs. The same section declares, that "no proceedings or judgment had or to be had by virtue of this act, shall be removed or superseded by virtue of any writ of certiorari, or other writ, out of His Majesty's Courts at *Westminster, unless the title of the tithes should be in question;*" and by sec. 8. it is enacted, "that if any person complained of for subtracting or withholding any small tithes, &c., should, before the Justices to whom such complaint is made, insist upon any prescription, composition, or modus decimandi, agreement, or title, whereby he is, or ought to be freed from payment of the tithes claimed, and deliver the same in writing to the Justices, subscribed by him, and should then give to the party complaining reason-

able and sufficient security to the satisfaction of the Justices, to pay all such costs and damages, as upon a trial at law, to be had for that purpose in any of His Majesty's Courts, having cognizance of that matter, should be given against him, in case the said prescription, &c. should not upon such trial be allowed; that in that case the Justices should forbear to give any judgment of the matter, and then the person complaining should be at liberty to prosecute him for the subtraction *in any other* Court, where he might have sued *before* the making of this act." Now the question is, whether, comparing these two clauses together, the Justices had any right to try the modus set up by the defendant. Assuming, for the sake of argument, that a claim of modus decimandi might be considered as involving a question of title within the meaning of either of the clauses, there is nothing which absolutely ousts the jurisdiction of the Justices upon such a question. The sec. 7, which gives the appeal, declares that the decision of the Sessions shall be final and conclusive, and takes away the certiorari. Then all that is done by sec. 8. is to give the party complained against, the option, if he chooses, of submitting the question to a higher tribunal. There is nothing which deprives the Justices of jurisdiction even in questions of title; and unless this construction is put upon sec. 8, the effect of that clause will be completely to neutralize the latter part of the appeal clause, which takes away the certiorari, and defeat the policy of the act, which was meant to give parties a cheap and summary mode of deciding claims for small tithes. If then the Justices are not ousted of their right to hear evidence in support of the modus, the question, secondly, is, whether the Justices at Sessions acted properly in rejecting the evidence which the defendant tendered. Admitting that the defendant did not offer this evidence, in the first instance, before the two Justices, still he was not precluded from adducing it at Sessions upon the appeal. The defendant was not bound, in the first instance, to put forth the whole

strength of his case, but was at liberty to reserve himself for the trial at the Sessions. He was not in the situation of a person against whom an action was brought, who, in the first instance, would be bound to disclose the whole of his case. This was a summary proceeding before two Justices, and he was at liberty to reserve the strength of his case for the appellant jurisdiction. The Sessions therefore were bound to receive the evidence, and at all events they were premature in rejecting it, because there was nothing in sec. 8. to restrain them from determining the question of modus. The object of that clause was only to give the party complained against the privilege, if he chose, of trying the question by a higher tribunal, upon entering into security for costs. Unless the Court therefore are satisfied, first, that a modus decimandi is a question of title, and, second, that the Justices have no jurisdiction to determine that question, this order of Sessions must be quashed. He cited *Rex* v. *Wakefield* (a).

Cooper, in support of the order of Sessions, urged the objections with which he commenced, and insisted that the Justices who originally heard the case had no jurisdiction to entertain the question of modus, and that the Sessions at all events exercised a sound discretion in rejecting on the appeal, evidence, which had not been tendered in the first instance. Upon the first point, he contended, that the ss. 7. and 8. were consistent with each other, and though the word "title" was found alone in the former, yet a modus decimandi, being specifically mentioned in the latter as one of the enumerated modes of defence in connection with the word "title," it was obvious that this case came within the scope of that section, and deprived the Justices of jurisdiction upon such a question. Looking to the scope of the statute, it was clear that the Justices were merely to decide the amount of the tithes claimed, and the moment any ques-

(a) 1 Burr. 485.

1823.
The King v. Jeffery.

tion of title arose, their jurisdiction was gone. Questions of modus were of infinitely more general importance, and requiring more nice deliberation, and learning than a mere question as to who was entitled to the tithes; and therefore there was a stronger reason in this case why the construction, he contended for, should be put upon the statute. But supposing the Court not prepared to pronounce in his favor on this part of the case, the second ground of his argument was unanswerable, namely, that the defendant's evidence was out of time and place; for he should have submitted it, in the first instance, to the Justices by whom the case was first heard, if he meant to avail himself of the modus as a ground of defence. Upon this point he cited *Rex* v. *The Justices of Suffolk.*

Storks, in reply, contended, that a modus decimandi could not by any construction be considered to mean a question of title, to which alone the restriction as to the jurisdiction of the Justices must be confined, and certainly the importance of such questions was no reason for ousting the jurisdiction, because questions of title required as much knowledge of the law as was requisite in adjudicating a question of modus; then, secondly, the appeal was to be considered as an original hearing of the case, when it was competent to the appellant to bring forward fresh matter, although it had not been submitted to the jurisdiction from which the appeal lay. He cited *Rex* v. *The Commissioners of Appeals in Matters of Excise* (a).

Abbott, C. J.—As at present advised, I am strongly inclined to think that a modus decimandi is a different matter from a *title* to tithes, and inasmuch as the *title* did not come in question within the meaning of the words of the appeal clause, which takes away the certiorari, I think the certiorari ought not to have issued; but as that question should rather

(a) 3 M. & S. 133.

have been agitated upon a rule to quash the certiorari than upon the present rule, which is to quash the order of Sessions, my opinion is not grounded upon that point. I am also strongly inclined to think (but I should take a little further time to consider the subject, if it were necessary to decide the case upon that ground) that the eighth section is compulsory upon the party, who means to set up a modus, that he shall set it up in the way therein directed. In principle, it is clear that this act of parliament was intended only to apply to those cases in which the tithes were actually due, independently of any dispute upon matters of law, either with regard to the person receiving them, or the manner of receiving them. We cannot doubt that that is the principle of the act. The object of it was to give to the owner of tithes an expeditious mode of recovering them; and it must be obvious, that a cheap and expeditious remedy, in such cases, must be no less beneficial to the tithe owner than to him who is to pay. Every suit for subtraction of tithes, whether in a court of common law, or a court having ecclesiastical cognizance, must in its nature be very expensive, and of course equally burthensome to him who claims and him who pays. One cannot doubt that it was to remedy this evil that the act was passed, and if the eighth section be not held compulsory upon the party who sets up a modus, this consequence will follow, namely, that it will be in his power either to submit the question to, or withdraw it from the jurisdiction of the Justices at his own will and pleasure, and the party claiming will have no option upon the subject. It must come to this, that if the party called upon to pay chooses to say that the Justices shall not try the question, the Justices have no alternative, and cannot proceed; but unless he thinks fit to object to the jurisdiction, the party claiming must submit to the jurisdiction of the Justices, because the words of the seventh clause are obligatory, and none but the Justices shall decide. That being a point however of extensive consequence, I should

1823. The King v. Jeffery.

take more time to consider of it if I were called upon to pronounce a deliberate judgment. Upon the other point made in the case I entertain no doubt whatever. If it was clearly the intention of this party to set up his claim to a modus, he should have done so before the two Justices in the first instance. This case differs from almost every other in which an appeal is given. In general, a party claiming to have the decision of Justices in his favor, is bound, in the first instance, to prove his whole case; but in the case of a claim of tithes, all that is requisite to be done in the outset, particularly with respect to predial tithes, is to prove that the party was in the occupation of the land in question, and thereby establish a primâ facie title. But a composition, or modus decimandi, is something perfectly distinct from a question of title in the party claiming the tithes; and it seems to me to be exceedingly reasonable, that he who insists upon such a defence, in answer to a primâ facie case, must do so when the case is first brought before the magistrates, and that if he forbears so to do, the Justices at Quarter Sessions have a right to exercise their discretion whether they will or will not allow him to do that before them for the first time. If they did not exercise such a discretion, the respondent might be taken by surprise, and the appellant would have an opportunity of walking over the course, by calling witnesses, whose evidence the other side would be utterly unprepared to meet. I think the Justices at Sessions exercised a sound discretion in refusing to receive this evidence; and for that reason I think their order must be confirmed.

Bayley, J.—My opinion is founded upon the last point mentioned by the Lord Chief Justice. I think the Justices at Sessions had a right to exercise their discretion upon the question, whether they would or would not enter into the point respecting the modus, and I am of opinion they have exercised a most sound discretion in rejecting evidence upon

1823.

The King v. Jeffery.

that point. The party here was at liberty to appeal if he found himself aggrieved by the judgment of the two Justices. The judgment of the two Justices was founded upon all the evidence laid before them. Both parties were before the Justices, each being competent to disclose the whole of his case. The evidence was all on one side, and upon that evidence the decision of the Justices was founded; but the defendant, who afterwards complained of their judgment, gave no evidence upon the point, with respect to which he attempted to set their judgment aside. It does not appear that before the Sessions commenced, he gave any notice that he meant to insist upon a modus, and from the nature of the question there was nothing to indicate to the respondent that he intended to rely upon that ground of defence; but having contented himself with merely going before the magistrates, and hearing the evidence on the part of the complainant, he then goes before the Sessions, and for the first time offers evidence of a modus. I think he was not at liberty to do that. Upon the words of this statute I entertain some degree of doubt, whether the Sessions, after having heard the appellant's evidence in support of a modus, would have been at liberty to adjourn the further consideration of the case, because sec. 7. directs, that their decision shall be final and conclusive. But, without saying whether they might do so, in order to give the party making the claim an opportunity of bringing evidence in reply to that which had been offered in support of the modus, such a proceeding would of necessity produce a degree of expence greatly beyond the value of the tithes in dispute, and thereby tend to defeat the policy of the act. Upon the other point, I am of opinion, that as the defendant did not make his stand upon a modus before the two Justices, and did not give proper notice before the Sessions that he meant to rely upon that ground, the Sessions exercised a sound discretion in rejecting the evidence, and therefore their order must be confirmed.

1823.

The King v. Jeffery.

Holroyd, J. was in the bail court during part of the argument, and declined giving any opinion (a).

Order confirmed.

(a) *Best*, J. was absent.

Friday, May 2d.

Law v. Pugh.

Cause of action arose on the 29th *January*, being the first day of the *fourth* year of the reign of *Geo.* 4. and declaration was entitled, "*Saturday* next after fifteen days of St. *Hilary*, in *Hilary* Term in the *third* year of King *George* the Fourth;" which would be 1st *February*, in the *fourth* year of the reign:—Held, on demurrer, that the declaration was properly entitled, though plaintiff appeared, in terms, to have commenced his action before the cause had arisen.

Debt on a bail-bond. The declaration was entitled, "*Saturday* next, after fifteen days of St. *Hilary*, in *Hilary* Term in the third year of the reign of King *George* the fourth." The assignment of the bail-bond was dated the 29th *January*, 1823, being the day the cause of action arose. The 29th *January* was also the day on which the *fourth* year of the present king's reign commenced, and "*Saturday* next after fifteen days of St. *Hilary*," was the 1st *February* following. To this declaration the defendant demurred, and assigned for cause, that it appeared by the declaration, that the plaintiff commenced his action before the time when he alleged his cause of action to have arisen. Joinder in demurrer.

J. Evans, in support of the demurrer, contended, that the declaration was improperly entitled, being in the *third* year of the reign, the cause of action not having arisen until the 29th of *January*, when the *fourth* year of the reign commenced.

E. Lawes, contrà, was stopped by the Court.

Per Curiam (a).—This declaration is not demurrable. "*Saturday* next, &c." refers to the *term*, and not the *year* of the king's reign, and the term being but one day in point of law, it may be styled of the year of the king's reign in

(a) *Abbott*, C. J. and *Best*, J. were absent.

which the first day happens to fall. The words "*third* year of the reign, &c." are merely descriptive of the *term*, and do not apply to "*Saturday* next after fifteen days of St. *Hilary*;" and therefore there is nothing in the objection.

Judgment for the plaintiff on demurrer (*a*).

(*a*) Vide Jenk. Cents. 180.— Noy's Max. 3 & 4. Com. Dig. tit. Action upon Statute, I. *Nutt* v. *Steadman*, Fort. 372. *Ibbotsham* v. *Cook*, Id. Mod. 302. 3 Lev. 333. 1 And. 295. and Lutw. 1107.

DICAS *v.* PERRY.

Saturday, May 3d.

Second writ of sci. fa. against bail, not having lain in the sheriff's office four whole days, *exclusive* of the day on which it was lodged, the return day, and an intervening *Sunday*:—Held irregular.

IN this case, judgment had been signed against the bail, and a rule nisi granted for setting it aside, on the ground that the second sci. fa. had not been left four whole days at the sheriff's office.

D. F. Jones now shewed cause, and contended, that the writ had been left the proper time. The writ was lodged on the *Saturday*, and not returnable till the following *Thursday*; so that it remained at the office four clear days, exclusive both of the day on which it was left, and the return, which is all that is required by the practice of the Court. But supposing *Sunday* is not to be counted, either the *Saturday* or the *Thursday* ought to be. It is too much to exclude all the three days. The case of *Howard* v. *Smith* (*a*), seems to have been considered only with reference to the counting of the *Sunday*, and not with reference to the exclusion of both the first and the last days, as well as the *Sunday*.

Parke, contrà, was stopped by the Court.

(*a*) 1 B. & A. 529.

1823.
Dicas v. Perry.

Per Curiam.—It is now too late to open the discussion of this point. The practice is understood to be settled, that the writ must lie in the office four days, exclusive of the day on which it is lodged, and of the return day, and of any *Sunday* that may intervene.

Rule absolute.

RULE OF COURT.

Easter Term, 4th Geo. 4.

UPON reading the rule made in this Court in *Hilary* Term last, touching commissions for taking affidavits in this Court, It is ordered, that attornies and solicitors duly enrolled, and practising in any of the Courts of Great Sessions in *Wales*, or in either of the Counties Palatine of *Chester*, *Lancaster*, or *Durham*, be comprised within the said rule, in like manner as attornies or solicitors of the Courts at *Westminster*.

MEMORANDA.

IN *Hilary* Vacation, Sir *George Wood*, Knt. one of the Barons of the Exchequer, retired from the Bench, and was succeeded by *John Hullock*, Esq. Serjeant at Law.

INDEX

TO THE

PRINCIPAL MATTERS.

had and received:—Held, that the money in the hands of the latter was equitable, and not legal assets, and consequently could not be recovered at law:—Held also, that an express promise by the defendant to pay the plaintiffs the money in question, was a nudum pactum, they having no title to it in a court of law. *Clay and others* v. *Willis*, 4 *G*. 4. *Page* 539

See COVENANT, 4.

AFFIDAVIT OF DEBT.

1. An affidavit to hold to bail, stating "that the defendant is indebted to the plaintiff in the sum of 1000*l*., upon and by virtue of a certain memorandum in writing, bearing date, &c. and signed by the defendant, whereby he promised plaintiff, that when he returned in the month of *March* or *April* then next, he would marry her, or pay her the sum of 1000*l*.," without shewing any mutual consideration on the part of the plaintiff to sustain the defendant's promise, is insufficient. *Macpherson* v. *Lovie*, 3 *G*. 4. 69
2. Affidavit "that *W*. *C*. is justly and truly indebted to this deponent in the sum of 44*l*. 11*s*., being the amount of a certain inland bill of exchange, drawn by the said *W*. *C*. on this deponent, and by him accepted for the honor of the said *W*. *C*., payable to the order of the said *W*. *C*., at a day now past, and which said bill of exchange was paid by this deponent," discloses a sufficient cause of action to hold the defendant to bail; and held that a declaration, containing the money counts only for the amount of the bill, was no variance from the affidavit of debt. *Brooks* v. *Clark*, 3 *G*. 4. 148

AGENT.

1. Where the agent employed in endeavouring to carry through parliament, a bill for making a railway, sued the chairman of a committee of subscribers to the undertaking, for his work and labour, and expences incurred as such agent, and it appeared that the agent himself was a subscriber to the undertaking:—Held, that the action would not lie. *Holmes* v. *Higgins*, 3 *G*. 4. *Page* 196
2. *A*. ships goods to *India*, and in his letter of instructions to his agent *B*., directs him to invest the proceeds in certain specified articles of merchandize, *or in bills at the exchange of the day*, and remit them to *England*. *B*., instead of complying with his orders, invests the property in a commodity not specified in his letter of instructions, and transmits a bill of lading for the same, which reaches *A*. on the 29th *May*, who notifies to an agent of *B*., on the 7th *August*, his dissent from what has been done, the goods having in the mean time been lost at sea:—Held, that the laches of *A*., in delaying his notice of abandonment so long, discharged *B*.'s liability. *Prince* v. *Clark*, 3 *G*. 4. 266
3. The certificate of an agent for *Lloyd*'s, at a foreign port, ascertaining an average loss upon a cargo damaged by sea water, is not admissible evidence alone of the amount of loss in an action by the assured against the underwriter in this country. *Drake* v. *Marryat*, 4 *G*. 4. 696

See BILL OF EXCHANGE, 3.—LIEN. VENDOR AND VENDEE.

AGREEMENT.

The Court will not compel the plaintiff to deliver to the defendant a copy of an agreement, in order to enable the latter to plead in abatement that the agreement was signed jointly by himself and others. *Beale* v. *Bird*, 4 *G*. 4. *Page* 419

See Administration. — Annuity, 1.—Attorney, 4. 7.—Bill of Exchange, 4.—Ejectment, 8, 9.—Guaranty, 2.—Infant, 1.—Replevin, 2.—Trespass, 1.

AMBASSADOR.

See Privilege, 2.

ANNUITY.

1. It is discretionary with the Court whether they will give relief under s. 4. of the Annuity Act, 17 *G*. 3. c. 26. Where, after the consideration of an annuity had been paid to the grantor, the latter immediately paid back to the grantee (who was in partnership as an attorney with two other persons) a sum for procuration money, in pursuance of an agreement for that purpose, and there appearing to be no fraud or collusion: — Held, that the deeds were not void by the 4th section of the statute, and that the Court might impose such terms upon the parties as seemed just and reasonable. *Girdlestone* v. *Allan*, 3 *G*. 4. 150
2. An instrument reciting that it had been agreed to sell an annuity, secured upon property in possession of the grantor, but containing no words of present grant, cannot be sued upon in a court of law, even though it should be inrolled. *In re Samuel Locke*, 4 *G*. 4. 603

See Devise, 1.—Indemnity Bond.

APPEAL.

A poor rate having been made on the 9th, allowed on the 11th, published on the 14th, and the Sessions commencing on the 15th of *April*:—Held, that an appeal against the rate need not be entered until the Sessions next but one after the publication of the rate. *The King* v. *The Inhabitants of Hendon*, 3 *G*. 4. *Page* 249

See Bastardy, 2.—Overseers, 2.

APPRENTICE.

Declaration upon an indenture of apprenticeship, whereby a master covenanted, in consideration of a premium of 90*l*., to instruct his apprentice in the business of a tobacconist, for four years, and to board and lodge him during that time, alleged, 1. A general breach in the terms of the covenant; 2. A particular breach on the 13th *July*, averring a refusal to instruct on that day or at any other time; and, 3. A similar breach as to boarding and lodging on the same day, and alleging, that on that day the master compelled the apprentice to quit the service, and refused to maintain and keep him, contrary to the effect of the covenant. Pleas, 1. Performance of the covenant until the 10th *July*; 2. Willingness to maintain and keep the apprentice during the whole term, but that from the date of the indenture until the 10th *July* the apprentice would not truly and faithfully serve defendant, nor attend to his business, but refused so to do, and setting forth various acts of misconduct on his part during the interval mentioned, and concluding, that, on the 10th *July*, the apprentice, against the orders of defendant, quitted

the service, declaring that he would never return again, whereby defendant was hindered and prevented from performing his covenant; 3. Readiness to instruct and maintain according to the effect of the covenant, but averring neglect and refusal of apprentice to obey defendant's lawful commands on the 10th *July*, and a refusal any longer to serve him, and absconding on that day, whereby he was prevented from performing his covenant; 4. Averring a wrongful absence of the apprentice on the 10th *July*, whereby, &c.; and, 5. A denial that defendant had compelled the apprentice to quit his service. Replication took issue on the first and fifth pleas, and as to the other pleas there was a confession of the breaches of duty mentioned therein; but replying, that on the 13th *July* the apprentice returned to defendant, and tendered and offered himself to serve and obey him according to the indenture, but that defendant upon request refused to take him back, &c. Demurrer to the replication to the second, third, and fourth pleas, and joinder therein:—Held, that covenant would lie upon the indenture, notwithstanding the misconduct of the apprentice:—Held also, that there was no departure or discontinuance in the pleadings. *Winstone* v. *Linn*, 4 *G.* 4. *Page* 465

See SETTLEMENT, 7.

ARBITRATION.

Agreeing to refer the quantum of damages to arbitration, after a question of law has been reserved by the judge at the trial, does not waive an objection to the defendant's liability in the action after the arbitrator has made his award. *Oxenham* v. *Lemon and others*, 4 *G.* 4. *Page* 461

See AGREEMENT.—ATTORNEY, 7. AWARD, 1.

ARBITRATOR.

See FOREIGN ATTACHMENT.

ARREST.

1. The defendant was arrested, and executed a bail-bond by the initials of his christian names only, as the acceptor of a bill of exchange, in which his initials only appeared:—Held, that the bail-bond ought to be cancelled, but without costs. *Parker* v. *Bent*, 3 *G.* 4. 73
2. Where a widow was arrested upon a bill of exchange, accepted by her in the name of *W. S. Chatterley*, by which name she had always gone since her husband's death, *W. S.* being the initials of her husband's christian names, the Court set aside the bail-bond only on entering a common appearance. *M'Beath* v. *Chatterley*, 3 *G.* 4. 237
3. A defendant arrested for a debt, contracted partly before and partly after bankruptcy and certificate, there being a subsequent promise for the former part, was discharged out of custody on filing common bail. *Peers* v. *Gadderer*, 3 *G.* 4. 240
4. Defendant was arrested and held to bail for 17*l.*, and paid 3*l.* into Court, which plaintiff took out and stayed proceedings:—Held, that defendant was not entitled to costs under stat. 43 *Geo.* 3. c. 46. s. 3. *Porter* v. *Pittman*, 3 *G.* 4. 266

See BANKRUPT, 1.—BARON AND FEME, 1.—PRIVILEGE.—SMUGGLERS.—STAMP.

ASSIGNEE.

A. and *B.*, co-partners in trade, borrow a check for 200*l.* from *C.* for the express purpose of enabling them to liquidate the balance of an account with their bankers, but before the check is presented, they commit an act of bankruptcy, and afterwards return the check to *C.*, declining to make any use of it:—Held, the check did not pass to the assignees so as to enable them to recover the amount in trover. *Moore and another* v. *Bartrup*, 3 *G.* 4. *Page* 25

See Bankers, 1.—Bankrupt, 3. Bill of Exchange, 4.—Covenant, 4.—Fraudulent Preference.—Lease.

ASSIGNMENT.

See Administration.—Lord's Act.

ASSUMPSIT.

A. is let into possession of the refuse spar, produced from a lead mine, situate in land demised to *B.*, a farmer (as tenant from year to year), and pays an annual rent for the spar to *B.*'s landlord, and exercises dominion over it by disposing of it as his property; *C.* from time to time, enters upon the land, and carries away portions of the spar, and *A.* brings assumpsit for the value of the spar so taken away. After verdict by the jury, finding that *B.* the tenant of the land, has an interest in the spar, and has not surrendered it to his landlord:—Held, that the landlord cannot convey such a title to *A.* as will enable the latter, (supposing his possession is clearly established) to waive the tortious taking, and bring assumpsit for the value of the spar, in the absence of an express contract of sale, though the tenant has never disturbed his possession. *Lee* v. *Shore*, 3 *G.* 4. *Page* 198

See Annuity, 2.—Bankers, 1.—Fraudulent Preference.—Guaranty, 2.—Stockholder.

ATTACHMENT.

See Award, 2.—Bail, 1.—Foreign Attachment. — Marshal.

ATTORNEY.

1. By statute 22 *G.* 2. c. 46. s. 11, it is enacted, " that if any sworn attorney or solicitor shall suffer his name to be used by an unqualified person to enable him to practice as an attorney or solicitor, and complaint shall be made thereof in a *summary way, and proof made thereof on oath to the satisfaction of the Court*, such attorney or solicitor shall be struck off the roll;" and by the same section it is enacted, " that in that case, and *upon such complaint, and proof made as aforesaid*, it shall be lawful for the Court to commit such unqualified person, so acting or practising as aforesaid, to the prison of the said Court for any time not exceeding one year:" – Held, that a person brought within the latter branch of the section, upon affidavit of his offence, was not entitled to have the witnesses in support of the charge examined vivâ voce.

After the matter had been referred in such case by consent of counsel, to the master of the crown office, who reported the party in contempt, the Court allowed the latter to bring the whole of the case under their

own consideration, when brought up to be committed. *In re George Jaques*, 3 *G.* 4. *Page* 64

2. An attorney who discontinues to practice after his last certificate has expired, may be re-admitted without payment of any arrears of duty, or any fine. The word "neglect" in 37 *Geo.* 3. c. 90. s. 31, means "culpable neglect," and does *not apply* to a person who has omitted to take out his certificate during the interval of his ceasing to practice. *Ex parte Matson*, Gent. 238

3. An admitted attorney of this Court may recover for his fees and disbursements in suing out a commission of bankrupt, though he be not a solicitor in Chancery. *Wilkinson* v. *Diggles*, 3 *G.* 4. 302

4. The respective attornies in a horse cause, which had been withdrawn at the assizes, signed the following undertaking: We, the undersigned, attornies for the above-named plaintiff, and the above-named defendant, do hereby *personally* consent, undertake, and agree, that the record in this cause shall be withdrawn; that the above-named defendant shall take back again the horse in the pleadings in this cause named, and shall pay the sum of 64*l.* 17*s.* to the above-named plaintiff; *that the costs of the suit on the part of the defendant shall be taxed between the parties, on the principle between plaintiff and defendant*; and that such taxation shall be made and perfected by, &c.:—Held that the plaintiff's attorney, in the original action, was personally liable upon this undertaking to pay to the defendant's attorney the costs, when taxed pursuant to the agreement. *Iveson* v. *Conington*, 3 *G.* 4. 307

5. An attorney who, whilst he is a prisoner in gaol, sues out or commences any process in the county court, is within the stat. 12 *Geo.* 2. c. 13. s. 9, and liable to be struck off the roll. *Ex parte Flint*, 4 *G.* 4. *Page* 406

6. The statute 34 *G.* 3. c. 14. s. 2, requires, that the indentures of an attorney's clerkship shall be enrolled, together with an affidavit of the time of executing the same, before the clerk shall be admitted to practice as an attorney; and enacts, that unless the indentures are inrolled within six months next after execution, together with the affidavit, the service shall be deemed to commence from the time of enrolment only. Where a clerk had been articled to an attorney in the country, and the indentures had been sent up to *London* to be enrolled in the Master's office pursuant to the statute, and after the clerkship had been served, no trace of the indentures could be discovered in the Master's office, the Court refused to admit him, although it appeared from the books of the town agent, that a clerk of the latter had paid the fees payable in the Master's office upon enrolment contemporaneously with the time when the enrolment was supposed to have taken place. *Ex parte Pilgrim*, 4 *G.* 4. 429

7. Where an attorney is retained jointly by several parties to defend a suit against each, delivery of a bill to *one* is sufficient to entitle him to maintain a joint action against all for his costs, within 2 *G.* 2. c. 23. s. 23. *Oxenham* v. *Lemon*, 4 *G.* 4. 461

See ADMINISTRATORS.—BAIL, 7. EVIDENCE.—LIEN.—PRISONER. STAYING PROCEEDINGS.

AWARD.

1. Where a verdict was found for the plaintiff at nisi prius, for the damages in the declaration, subject to the award of a gentleman at the bar, and the arbitrator declined proceeding in the reference:—Held, that the plaintiff was entitled to judgment and execution forthwith, unless the defendant consented to refer the damages to another arbitrator. *Woolley* v. *Clark*, 3 *G*. 4. *Page* 158

2. By agreement *C*. and *A*. referred all matters in difference between them to three arbitrators concerning the value of certain stock and goods, and also concerning the sum or sums which each should contribute towards the payment of 2500*l*. and the costs incurred in bringing and defending certain actions in which they were respectively interested. The arbitrators awarded, 1st. That all matters in difference should cease and determine. 2d. That *A*. should pay to *C*. 441*l*. 2*s*. 2*d*. his proportion of the sum of 2500*l*. 3d. That *C*. should pay five-eighth parts, and that *A*. should pay three-eighth parts of the costs of the actions mentioned in the submission. 4th. That all such sums as *C*. and *A*. had already expended in respect of the said actions, should be considered as part payment of their respective shares, according to the portions before mentioned. That the costs of the reference should be paid by *C*. and *A*. in equal moieties; and, 6th. That upon payment of the 441*l*. 2*s*. 6*d*. the costs of the actions, and the costs of the reference, in the manner awarded, *C*. and *A*. should execute mutual releases. On motion to set aside this award, on the ground that it was not final, and was void for uncertainty, the Court refused to set it aside, the objections being pleadable to any action brought upon it, but would not grant an attachment for non-performance. *In re Cargey and Aitchison*, 3 *G*. 4. *Page* 222

3. This Court will not entertain an application for setting aside an award, founded upon an indictment at the Assizes for not repairing a road, though the question in dispute be of a civil nature. *Rex* v. *The Inhabitants of Cotesbach*, 3 *G*. 4. 265

See Foreign Attachment.

BAIL.

1. Where time was given to the plaintiff to see whether bail were really possessed of the property in respect of which they professed their ability to justify, and on the day appointed for coming up again, the bail being rejected, immediately rendered the defendant:—Held, that the sheriff was liable to an attachment, the notice of render not having been served until after the attachment had issued. *The King* v. *The Sheriff of Middlesex*, 3 *G*. 4. 225

2. Where it appeared after bail had justified, that money had been given to one of them for his trouble and loss of time in coming up to justify, the Court did not set aside the allowance, but imposed upon the defendant the terms of producing an affidavit of merits, bringing the sum sworn to into Court, and taking short notice of trial. *Wyllie* v. *Jones*, 3 *G*. 4. 253

3. In bail by affidavit, time will not be given to amend a mistake in the jurat, occasioned by the error of the commissioner in the

country, unless the defendant produces an affidavit of merits. *Burford* v. *Holloway*, 4 *G*. 4. *Page* 362

4. Principal became bankrupt, and on the same day that he obtained his certificate, but before the rising of the Court, the bail were fixed on scire facias:—Held, that the bail had, till the rising of the Court on that day, before they could be fixed, and on payment of costs, the Court entered an exoneretur on the bail piece. *Johnson* v. *Linsey*, 4 *G*. 4. 385

5. Where hired bail, who were insolvent, of whom notice had been given, and to whom no exception was entered, became bail in error, and the plaintiff treating the writ of error, and the bail as nullities entered up judgment, and took out execution:—Held, that the execution was regular, and the Court discharged the rule for setting it aside with costs. *Ward* v. *Levi*, 4 *G*. 4. 421

6. *Crum* v. *Kitchen*, *Hil.* 1820.—S. P. 421

7. Though bail justify by consent at the Judge's chambers, the practice of the Court requires that a rule for the allowance of bail should, notwithstanding, be served on the plaintiff or his attorney. *Bignold* v. *Holding*, 4 *G*. 4. 436

See Certiorari, 7.—Indemnity Bond.—Plea.—Privilege.—Supersedeas.—Writ of Error, 1.

BAIL BOND.

See Arrest, 1, 2, 3.—Bankrupt, 1.—Baron and Feme, 1.

BANKERS.

1. Two several banking firms, carrying on business respectively in the same country town, were in the habit of exchanging notes and securities with each other, and settling their balances by a prescribed mode. One of the firms became bankrupt, and at the time of the act of bankruptcy, each firm had in their possession notes and securities of the other to nearly the same amount. The provisional assignee of the bankrupt firm being apprized of this fact, presented and obtained payment of the notes of the solvent firm, partly at their bank, and partly at their agents in *London*, who did not know the situation of the parties:—Held, that the solvent firm might sue the provisional assignee for the amount of the notes in assumpsit, for money had and received, though the conduct of the latter savoured of tort. *Edmeads* v. *Newman*, 4 *G*. 4. *Page* 568

2. The member of a country bank signed for himself and partners notes, beginning with the words, "I promise to pay, &c.:"—Held, that he made himself severally liable upon the notes, and could not plead in abatement a joint liability with his partners. *Hall* v. *Smith*, 4 *G*. 4. 584

BANKRUPT.

1. Where an aged member of a banking firm was arrested on the 20th of *May*, at his private dwelling, distant several miles from the house of business, for a partnership debt, and after the sheriff's officer was prevailed upon to withdraw, upon a promise of his executing a bail bond when required; he reproached his servants for letting such persons into the house, and ordered them not to let any person into the

house they did not know, stating that he was afraid of being arrested again; and next day the servants did not open the door without ascertaining from the windows what persons required admission, and the outer gate of the house was kept locked; and it further appearing that on the 21st of *May*, he removed from one apartment of the house to another to avoid being seen by a person who called, whom he supposed to be a creditor:—Held, that he committed an act of bankruptcy on the morning of the 21st *May*, within the meaning of the words of 1 *Jac.* 1. c. 15. s. 2, "to the intent, *or whereby* his creditors *shall* or *may* be defeated or delayed;" and which are to be read "to the intent his creditors *shall*, or whereby (or that thereby) they may be defeated," &c. *Harvey* v. *Ramsbottom*, 3 *G.* 4. *Page* 142

2. Where a judgment creditor purchased by bill of sale from the sheriff certain machinery, seized in execution, belonging to his debtor, and after marking the same with the initials of his name, allowed the debtor to retain possession, upon his agreeing to pay a rent for the use of it, and the latter remained in possession until he committed an act of bankruptcy:—Held, that as the change of ownership was not notorious, the assignees were entitled to recover the property in trover, under the 21 *Jac.* 1. c. 19. s. 11. *Lingard* v. *Messiter*, 4 *G.* 4. 495

3. The assignee of a bankrupt brought an action upon the 9 *Ann.* c. 14, to recover back money lost by the bankrupt to the defendants at the game of rouge et noir. To prove the loss of the money, the bankrupt who had been certificated, was called as a witness, and in order to render him competent, the bankrupt released the assignee of all claim upon the surplus fund, if any; all the creditors who had proved, released the bankrupt from all future claims, and the assignee (who was not a creditor), executed a like release to the bankrupt:—Held, 1st. That these several releases restored the bankrupt's competency, 2d. That after the expiration of more than a year from the date of the commission, it was to be presumed, that all the creditors had proved, and that a release, signed by all who had proved, was binding as a release by every one of the creditors; and, 3d. That the assignee's title to sue was not destroyed by the release he had executed, inasmuch as it only extended to the bankrupt's future estate. *Carter* v. *Abbott*, 4 *G.* 4. *Page* 575

4. Commissioners of bankrupt are not authorized by 5 *Geo.* 2. c. 30. s. 5, to enlarge the time for the disclosure of a bankrupt's estate beyond the time mentioned in sec. 3, of the same statute, still less for an indefinite period. Therefore where a bankrupt surrendered to his commission on the 4th *February*, and the commissioners, on his prayer, enlarged the time generally in writing, for him to make a full discovery of his estate and effects, and verbally fixed the adjournment day for the 1st *April*, and in the interval the bankrupt having surrendered in discharge of bail, was detained at the suit of a creditor, the Court refused to discharge him out of custody, not being protected from arrest by

the commissioner's order. *Claughton* v. *Leigh*, 4 *G*. 4. *Page* 831

See ARREST, 3.—ASSIGNEES.—ATTORNEY, 3.—BANKERS, 1.—BRINGING MONEY INTO COURT. COMMISSIONERS. — FRAUDULENT PREFERENCE.—GUARANTY, 2.—PARTNERSHIP, 1, 2.—SHIP.

BARON AND FEME.

1. Husband and wife being arrested for a debt contracted by the latter dum sola, the rule for cancelling the bail bond given by the wife, for the irregularity was made absolute, but *without costs*. *Taylor* v. *Whittaker and Wife*, 3 *G*. 4. 225

2. Where a feme sole, after marriage, was admitted tenant of a manor in the North of *England*, of certain premises to her and her heirs, as of her own tenant-right, according to the custom, and afterwards the lord executed a conveyance of the same premises to the husband in fee, and enfranchised the same from all seignory rights to which they were previously liable. Semble, that this conveyance after the death of the husband, had the effect of giving the wife an absolute estate in fee-simple in the premises, descendible only upon the heirs ex parte maternâ. *Doe*, d. *Newby* v. *Jackson*, 4 *G*. 4. 514

See ARREST, 2.—EJECTMENT, 11. LIMITATIONS.

BASTARDY.

1. An order of bastardy not made until twelve years after the death of the child, whereby the putative father (who had in the mean time absconded) is adjudged to pay two several sums, one for the bye-gone maintenance, and the other for the costs, is void; and though the filiating Justices commit the father upon an illegal warrant, from which he is discharged at the next Sessions, still they may afterwards issue a fresh warrant, founded on the original order; but if the case falls within 49 *Geo*. 3. c. 68. s. 3, as an order unappealed from, the commitment for non-payment of maintenance must be for three months, unless the money is sooner paid. A *general* commitment until the putative father pays *two several sums*, one for maintenance, and the other for costs, is bad in toto. *In re Joseph Addis*, 3 *G*. 4. *Page* 167

2. By statute 49 *Geo*. 3. c. 68. s. 5. the notice of appeal, in a matter of bastardy, must specify the cause and matter thereof. Where a notice given by the reputed father of a bastard child of his intention to appeal against an order of filiation, merely stated that he intended to prosecute an appeal against an order of filiation, whereby he was adjudged to be the father of a female bastard child, born of the body of *E. H.*, and chargeable to the parish of *S. L.*, pursuing the words of the order without specifying the particular grounds of appeal:—Held, that the notice of appeal was insufficient. *Rex* v. *The Justices of Oxfordshire*, 4 *G*. 4. 426

BILL OF EXCHANGE.

1. *A.*, the payee of a bill of exchange for 87*l*., having indorsed it to *B.* for valuable consideration, and the bill being dishonored, *C.*, the acceptor, sends another bill for 126*l*. (which has some time to run) to *A.*, who takes up the first bill by means of the second, receives the difference in discount, and indorses

the first bill again to *D.*, who sues the drawer before *C.*'s second bill becomes due:—Held, that taking the second bill did not amount to giving time and a new credit to the acceptor of the first, so as to discharge the drawer, who was no party to the transaction, unless there was evidence of an express *consent* on the part of *A.*, the payee, to give time, and not to sue upon the first bill until the second was at maturity. *Pring* v. *Clarkson*, 3 *G.* 4. *Page* 78

2. Declaration by indorsee against acceptor of a bill of exchange, averred that the bill had been indorsed to certain persons *trading under the firm of H.* and *F.*, and that *H.* and *F. had indorsed the bill by procuration of one J. D.* to *C.*, from whom plaintiff derived title. In proof it appeared that the firm of *H.* and *F.* had ceased to exist for ten years prior to the indorsement, but that a new firm of *H.* and *Co.* had been established, and that *D.*, one of the members thereof, was in the habit of indorsing bills by procuration in the name of *H.* and *F.*, but that all other transactions in trade were carried on in the name of *H.* and *Co.* only:—Held, that as between innocent indorsee and acceptor there was sufficient evidence to satisfy the allegation in the declaration. *Williamson* v. *Johnson*, 3 *G.* 4. 281

3. The traveller of plaintiffs, tradesmen in *London*, upon receiving a bill of exchange in payment of a debt due to his principals, from *A.* at *Derby*, pays it away to *B.*, without communicating to his principals the names of the person of whom he has received it. *B.* pays it to *C.* his brother, at *Luton*, in *Beds.*, by whom it is paid to his banker. The bill is dishonored on the 3d *April.* On the 5th, *C.* receives notice of the dishonor, and he, not knowing the parties to the bill, writes to his brother *B.* for information, who being then at *Edinburgh*, does not receive the letter until the 10th, when notice is sent to the plaintiffs, and by them received on the 13th. On the 14th plaintiffs write to *C.* for the bill, and receive it on the 16th, and by that day's post give notice to *A.*, the original indorser:—Held, that there was no laches which would discharge *A.*'s liability as indorser. *Baldwin* v. *Richardson*, 3 *G.* 4. *Page* 285

4. Assignees of a bankrupt declared as indorsees against drawer of a bill of exchange, and to prove notice to the latter of the dishonor by the acceptor, it was held that an agreement between the drawer and *K.*, (an intermediate indorsee) reciting that the bill in question was, amongst other bills, to which the drawer was a party, overdue, and was, or ought to be in the hands of *K.*, was evidence to satisfy the averment of due notice of dishonor to the drawer, though the assignees were no parties to the agreement:—Held also, that the assignees were not bound to prove in fact that they were assignees, though they declared in that character. *Gunson* v. *Metz*, 4 *G.* 4. 334

See ADMINISTRATION.—AFFIDAVIT OF DEBT, 2.—ARREST, 1, 2. BROKER. — GUARANTY, 2. — PARTNERSHIP, 1, 2.—STAYING PROCEEDINGS.

BOND.

See COVENANT, 1. — INDEMNITY BOND.—REPLEVIN.

BOROUGH.

See Bye Laws.—Corporation, 1. Manor.—Poor Rate, 2.

BRIBERY.

The Bribery Act, 2 *Geo.* 2. c. 24. s. 7. is to be construed prospectively, and not retrospectively. Where a declaration on this statute alleged that the defendant had received a bribe "for giving his vote," and the evidence negatived any promise or agreement for a bribe previous to the election:—Held, that the case was not within the statute, and that the objection was ground for a nonsuit. *Lord Huntingtower* v. *Ireland*, 4 *G.* 4. *Page* 450

BRINGING MONEY INTO COURT.

A separate commission being sued out against *A.*, and a joint commission being also sued out against him with *B.*, and the assignees under the first commission having recovered a verdict in trover against *C.*, the Court allowed the amount of the verdict to be brought in to abide the event of a petition to the Chancellor to supersede the first commission. *Hodgkinson* v. *Travers*, 4 *G.* 4. 409

See Bail, 2.

BRISTOL.

See Costs.—Court of Requests.

BROKER.

W., a broker, effects sale of twenty bags of wool for *H.* and *H.*, to *C.* and *P.*, to be paid for by bill at eight months, accepted by the latter, and, in his notice of sale, says to the former, "To shew my opinion of this house, for an allowance of one per cent., I will guarantee half the amount." *H.* and *H.* confirm the sale, and inform *W.*, that if he cannot procure from *C.* and *P.* acceptances of approved houses (which they would prefer), they will take his guarantee for one half the amount on the terms proposed. The wool is delivered to the vendees without the intervention of the broker, and the vendors take the acceptance of the former for the amount of the wool, made payable at a banker's. Before the bill is at maturity, the vendees become insolvent, and the vendors resort to the broker upon his guaranty:—Held, that the broker was liable on his guaranty, though the bill had not been presented for payment, and though there was no proof that it would not have been paid if presented; but supposing it to have been presented and dishonored, he would not have been entitled to notice of non-payment. *Holborow* v. *Wilkins*, 3 *G.* 4. *Page* 59

BYE LAWS.

The words "shall be lawful," when found in the bye law of a corporation, are not to be construed as obligatory to do what the law ordains. Therefore where a bye law of the borough of *Eye* ordained, that, upon the happening of any vacancy in the number of twenty-four common councilmen, such vacancies should be filled by the freemen inhabiting the town, and that a great court should be holden once every quarter, at which "it should be lawful" for the bailiffs to admit to the freedom of the town such persons as had been resident therein for one whole year:—Held, that this bye law was only optional, and could not be enforced by mandamus to compel

the admission of qualified inhabitants to the freedom of the borough. *Rex* v. *The Borough of Eye*, 3 *G*. 4. *Page* 172

See CORPORATION, 3.

CANAL.

Where a canal act declared, "that no boat navigating upon the said canal, which shall not be capable of carrying a greater burthen than twenty tons, or which shall not have a loading of twenty tons, shall be allowed to pass through any of the locks, unless the owner or navigator of such boat shall pay tonnage equal to a boat of twenty tons;" and it appearing that in no part of the act was a boat, per se, made liable to any toll, but that all the provisions as to tolls applied exclusively to goods conveyed on the canal:—Held, that the clause in question was confined to boats carrying *some* loading, and did not attach upon an *empty* boat passing the locks, reversing the decision in 2 *B*. & *A*. 66. *Leeds and Liverpool Canal Navigation* v. *Hustler*, 4 *G*. 4. 556

CARRIER.

A. consigns a quantity of iron to *B*. in barter, and *C*. the carrier delivers a part of the cargo on the wharf of the latter, but before the remainder is delivered, *C*. discovers that *B*. is insolvent, and re-ships the part delivered, and retains the whole to satisfy his lien for the freight of the cargo, and for a general freight account between him and the consignee:—Held, that the consignor's right of stoppage in transitu was not gone, and that he might maintain trover against the carrier for the goods. *Crawshay* v. *Eades*, 3 *G*. 4. 288

CASE.

1. *A*., an engineer, being employed by *B*. to erect a steam boiler, and other apparatus, on premises adjoining to the manufactory of *C*., and in consequence of the explosion of the boiler from the insufficiency of the materials of which it was composed, the property of the latter was injured, and it being found as a fact by the jury that *A*. was personally present, and that his servants had the management of the apparatus at the time of the accident:—Held, that *C*. might maintain case against *A*. for the injury he had sustained. *Semble*, that if the jury had negatived the fact of *A*.'s management of the apparatus, though the accident arose from an imperfection in the materials of which it was composed, he would not have been primarily liable. *Witte* v. *Hague*, 3 *G*. 4. *Page* 33
2. In case, for negligent driving, the law or usage of the road is not the criterion of negligence. Therefore where defendant's carriage was on the wrong side of the road, and in attempting to pass it on the near instead of the off side, plaintiff sustained damage:—Held, that it was for the jury to decide the question of negligence, without regard to the law of the road. *Wayde* v. *Lady Carr*, 3 *G*. 4. 255
3. If *A*., under pretence of a purchase, obtains possession of *B*.'s goods, with a pre-conceived design not to pay for them, and absconds to avoid suit for the value, and the sheriff seizes such goods in execution immediately after the delivery to *A*., it seems that *B*. may lawfully rescue them out of the hands of the sheriff even by stratagem, but the vali-

dity of the purchase by *A.* is a question for the jury. *Earl of Bristol* v. *Wilsmore*, 4 *G.* 4. *Page* 755

See COMMISSIONERS.—DISTRESS.

CERTIFICATE.

See ARREST, 3.—ATTORNEY, 2.—BAIL.—GUARANTY, 1.—REGISTRY ACTS.

CERTIORARI.

1. *Certiorari* will not lie to remove the record of a judgment obtained against a defendant in the county palatine of *Durham*, for the purpose of enabling his bail to render him in this Court, though he be a prisoner for debt in the custody of the marshal. *Paterson* v. *Reay*, 3 *G.* 4. 177
2. After conviction and judgment at the Sessions, the Court will not grant a certiorari to remove the proceedings for the purpose of having an indictment quashed on motion for error on the record. *Rex* v. *The Inhabitants of Penegoes and Machynlleth*, 3 *G.* 4. 209
3. Certiorari lies to remove an ejectment cause from an inferior jurisdiction into this Court, and need not be removed by habeas corpus cum causâ. *Goodright*, d. *Sadler* v. *Dring*, 4 *G.* 4. 407

See OVERSEERS, 2.—TITHES, 2.

CHANCELLOR.

See BRINGING MONEY INTO COURT.

CHARTER.

If a royal charter contains words of permission to do an act which is clearly for the public benefit, they are obligatory; therefore where a charter of *Jac.* 1, granted to the steward and suitors of a manor, *power and authority* to hold a Court for the purpose, (amongst other objects) of hearing and determining pleas of debt, &c. but the Court had been disused for that purpose during fifty years:—Held, that mandamus would lie to compel the Court to be held again, notwithstanding the non-user for such purpose. *Rex* v. *The Steward of Havering Atte Bower*, 3 *G.* 4. *Page* 176

See CORPORATION, 2.

CHURCHWARDENS AND OVERSEERS.

See EJECTMENT, 12.—OVERSEER, 1, 2.

CLERGY.

A spiritual person who in virtue of his office of chaplain of a college, holds a curacy with a dwelling attached thereto, and ceasing to hold the office of chaplain, retains possession of the dwelling, is not a curate within the meaning of 57 *Geo.* 3. c. 99. s. 67, and may be evicted by notice to quit forthwith, and is not entitled to the three months notice required to be given by that statute with the consent of the bishop. *Goodtitle*, d. *Lincoln College* v. *Lee*, 4 *G.* 4. 718

See TITHES.

COMMISSIONERS.

Trespass will not lie against commissioners of bankrupt for committing a witness to prison for not satisfactorily answering questions put to him whilst under examination, even though the questions may appear to this Court to have been satisfactorily answered. *Doswell* v. *Impey*, 4 *G.* 4. 350

See BAIL, 3. — BANKRUPT, 4. — COURT OF REQUESTS.—SEWERS. TRESPASS, 1.

COMMITMENT.

COMPOSITION.

CONSIDERATION.

CONSIGNOR AND CONSIGNEE.

CONSTABLE.

If a warrant be directed to a constable by name, he may execute it any where within the jurisdiction of the magistrate; but if it is directed to him by his name of office, he can execute it only in the parish, &c. of which he is a constable. Therefore where a warrant for levying a rate was directed "to the constables of the parish of *W.*, and to all others his Majesty's officers whom these may concern," and a constable of *W.*, in attempting to execute it in the parish of *D.*, was assaulted:—Held, that the assault was justifiable. *Rex* v. *Weir and Others*, 4 *G.* 4. *Page* 414

CONTEMPT.

CONTRACT.

CONVICTION.

COPYHOLD.

Tenant of a manor having been originally admitted to a copyhold estate, to hold the same for the lives of *H. D*, the elder, and *H. D.* the younger, afterwards surrenders the same into the hands of the lord, and takes a re-grant of the same estate for the lives of *J. G.* and *D. G.* his sons, and the life of the longest liver of them *successively*, according to the custom of the manor, and pays a fine to the lord for his admittance, the grant describing him as *sole purchaser*. By the custom of the manor, when a copyhold tenement is granted to a person to hold the same for the lives of two or more other persons, and the life of the longest liver of such other persons *successively*, and the grantee dies during the life or lives of one or more of such other person or persons, without having devised the copyhold by his will, such one or more of such other person or persons so surviving the grantee, shall be entitled to hold the copyhold *successively*, as they are respectively named in the grant during his or their life or lives; but if the grantee devises the copyhold by his will, the devisee upon his death shall hold the same during the life or lives of such other person or persons so surviving. Grantee devises his copyhold estate to his eldest son, one of the cestui que vies named in the grant, who, upon his father's death, enters into possession of the estate:—Held, that the custom was good and valid in law, and not being inconsistent with the grant, barred the lord's right of entry. *Doe, d. Nepean* v. *Goddard*, 4 *G.* 4. *Page* 773

CORPORATION.

1. Mandamus will not lie to admit an inhabitant of a borough by prescription to be a free burgess, unless it appear first, that he has an inchoate right to be a free burgess; and, second, that the office of free burgess is a corporate office by prescription. *Rex* v. *West Looe*, 3 *G.* 4. *Page* 178

2. A charter of incorporation empowered the mayor and aldermen *for the time being*, or the greater part of them, to choose and name four of the burgesses or inhabitants, "out of which four so to be named and chosen, the mayor, aldermen, bailiffs, principal burgesses and other burgesses, and inhabitants, *for the time being*, (they being also for that purpose there, upon the same day, congregated and assembled together) *or the greater part of them as should be so congregated and assembled*, might have power and authority by the greater part of the voices of them so assembled together, to choose and make one to be the mayor."—Held, that the election of a mayor by a majority of the whole elective body taken collectively was invalid, it appearing that there was not a majority of the definite body of principal burgesses present at the time of the election. *Rex* v. *Richard Bower*, 4 *G.* 4. 761

3. Payment of a fine, imposed by the bye laws of a corporation, for refusing to accept a corporate office, does not exempt the party elected from serving the office, and he may be compelled so to do by mandamus. *Rex* v. *Edward Bower*, 4 *G.* 4. 842

See Bye Laws.—Poor Rate, 2.

COSTS.

The defendant in a quo warranto information against him, to shew by what authority he holds the office of registrar and clerk of the court of requests of the city of *Bristol*, is not entitled to costs under the statute 9 *Anne*, c. 20. s. 5. *Rex* v. *Hall*, 4 *G.* 4. *Page* 341

See Arbitration.—Arrest, 1, 4. Attorney, 3, 4. 7.—Bail, 5, 6. Baron and Feme, 1.—Bastardy, 1.—Ejectment, 7. 9.—Infant.—Staying Proceedings.—Witness.

COVENANT.

1. In a declaration on an indemnity bond, to "save harmless and keep indemnified *W.* his heirs, &c. and also certain closes, &c. from and against *all actions, suits, claims, and demands whatsoever, both in law and equity*, which should or might be had, made, commenced, or prosecuted by any person or persons claiming any right, title, or demand, in, to, or upon the said closes, &c. as heir at law of *H. P.* and others, of and from all costs, charges, and expences, which the said *W.* &c. should sustain or be put, for or, by reason or means of such actions, suits, claims, and demands, or otherwise however;" to which the breaches assigned were, first, that on, &c. *H. W. P.* "made claim and demand, and claimed to have a right and title of, into, and upon the said closes, &c. and entered into and upon the same, and cut down grass, and felled trees there growing, and converted them to his own use;" and, 2d. that he "caused and procured, and suffered and permitted one *H. B.* who then

held and enjoyed the said closes, to attorn to him, and to withhold the payment of the rents, issues, and profits;" and, 3d. that "certain title deeds relating to the said closes, &c. were kept, detained, and withholden by one *A. W.* at the instance and through the means, and by and through the claim and demand of *T. B. W. P.*" &c.—Held, after defendant had pleaded over, that these breaches were well assigned on the covenant declared upon.—*Fowle* v. *Welch*, 3 *G*. 4. *Page* 133

2. Declaration in covenant for the assignment of a share in certain *stock*, professed to set out the covenant, and described it as a covenant to assign a certain sum of 2000*l*. Defendant, on oyer craved, set out the deed, and demurred as for a variance, that the covenant was to assign *stock*, not *money*:—Held, no variance; and, second, if it was, the defendant should have pleaded non est factum, and not have demurred. *Ross* v. *Parker*, 4 *G*. 4. 662

3. The Governors of the *Foundling Hospital* grant a lease for years of a certain dwelling to *L.*, and covenant that the demised premises, or any part thereof, shall not be converted into a shop or other place for carrying on any trade or public shew of business during the term, without the consent in writing of the lessors. *L.* assigns the lease to *M.*, who, by an under-lease, demises the premises to *F.* with a covenant for quiet enjoyment, "to hold the same, without any lawful let, suit, trouble, molestation, eviction, interruption, claim, or demand whatsoever, by or from her, her heirs, executors, administrators, or assigns, or any person or persons whomsoever, claiming, or to claim, by, from, under, or in trust for her, them, or any of them, or by or through her or their *acts, means*, right, title, forfeiture, privity, or *procurement*." In this lease the covenant against converting the premises into a shop, &c. is omitted. *F.* assigns the lease to *S.*, who under-lets to *W.*, and he converts part of the premises into a shop, without the consent of the original lessors, who bring ejectment and evict him for a forfeiture. *M.* having died, *S.* declared against her executor for a breach of the covenant for quiet enjoyment, averring, that by her *act*, and through her *means* and *procurement* in making the under-lease to *F.*, without any covenant similar to that in the original lease to *L.*, he was hindered from quietly enjoying, &c.—Held, on demurrer, that the action would not lie. *Spencer* v. *Marriott*, 4 *G*. 4. *Page* 665

4. A testator being seised in fee of certain lands, and also of a corn mill, demised the former to a tenant for three lives, covenanting for a money rent, and, in addition thereto, that the lessee should perform certain suits and services, and, amongst others, that he, his *heirs and assigns*, should do suit to the lessor's mill by grinding there all such corn as grew upon the demised land. The testator afterwards devised the mill, and also the reversion of the land *to the same person*, who became seised upon the death of devisor. During the demise of the land the lessee died intestate, and his wife took out administration of his estate and effects. Covenant being brought, assigning for a breach, neglect to grind

DEEDS.

The Court will not compel a party to allow the inspection of his title deeds, and give a copy thereof to a person who supposes that such deeds contain a reservation in his favor of manorial rights, unless it appears that the party holds the deeds as trustee for the applicant. *Pickering* v. *Noyes*, 4 *G*. 4. *Page* 386

See ANNUITY, 1. 2.

DEVISE.

1. Testator devises his freehold estates to trustees in trust, to secure an annuity of 60*l*. per annum to his wife for life, and then in trust for his two younger sons, and his two daughters, and all children to be begotten on the body of his wife, until they shall severally attain the age of twenty-one years, and then unto and among them, share and share alike as tenants in common, and not as joint tenants. The will then granted a power to the trustees to receive the rents, and to lay out the surplus beyond the wife's annuity, and other charges thereon, in good securities, to grant leases of the estates for a term not exceeding seven years, "and if they should think it advisable to sell any part thereof *at any time after my death:*"—Held, that this latter clause did not control the express gift of the estates to the children in fee, when they should severally attain the age of twenty-one years. *Doe*, d. *Budden* v. *Harris*, 3 *G*. 4. 36

2. *H. S.* devises his estate to his wife for life, and dies seised, leaving his widow and two sons, him surviving. After his death, the widow and the younger son, by deed of bargain and sale, convey the estate in fee to *H.* without the privity of the eldest son and heir at law of the testator. *H.* continues in undisturbed possession of the estate for twenty-two years, and dies possessed, bequeathing it to his children. Six years after *H.* entered into possession, *W. S.* the eldest son and heir at law of *H. S.* makes his will and devises all his real estate to his wife, and to his younger brother, in trust for the life of the wife, and then to his children, and dies three years afterwards, without ever disturbing *H.*'s possession:—Held, that the trustees might maintain ejectment to recover the possession of the estate, notwithstanding *H.*'s quiet enjoyment for twenty-two years. *Doe*, d. *Souter* v. *Hull*, 3 *G*. 4. *Page* 38

3. Testator after devising to his nephew *H. W.* a messuage, forming part of his real estate, devised as follows:—"Item, I give further unto my nephew *H. W.* half part of my garden, and 100*l*. stock in the 4 per cent. bank annuities. *I give further my yard, stable, cow-house, and all other outhouses in the said yard, my sister* Martha Wickham, *to have the interest and profits during her natural life:*—Held, by three Judges (*Best*, J. dissenting), that under this bequest *H. W.* after the death of *Martha Wickham*, took an estate in fee in the yard, &c. to the exclusion of the testator's heir at law. *Doe*, d. *Wickham* v. *Turner*, 4 *G*. 4. 398

4. A testator devises his freehold and copyhold lands to trustees, in trust, for his infant son, and directs "the same to be *transferred* to him as soon as he shall attain to twenty-one years; but in

case he should die before he attains to the age of twenty-one years, then I give to my cousin *W. P.*; his heirs and assigns, all my freehold and copyhold lands, &c."—Held, that the trustees did not take a fee by this devise, but only an estate for years, determinable upon the son's attaining twenty-one years. *Doe*, d. *Player*, v. *Nicholls*, 4 *G*. 4. *Page* 480

5. Testator, in 1814, after devising to his wife for life the mansion in which he then lived, with all the buildings and lands thereunto belonging, as then enjoyed by him, with all the appurtenances, devised as follows:—"And from and after her decease, then I give and devise all my said mansion called *D.*, *with all the buildings and lands thereunto belonging, as now enjoyed by me, with all the appurtenances*, unto my godson *J. S. B.*, his heirs and assigns for ever." Testator had purchased the estate called *D.* in 1772, and in 1792 purchased an adjoining estate called *U. H.*, and in two years afterwards took several closes, forming the latter, into his own occupation, and, after removing the fences, continued to occupy the same until the time of his death; the additional closes having, in the interim, been always known by the name of the "*D.* meadows:"—Held, that, under the devise, the additional closes passed to the godson. *Bodenham* v. *Pritchard*, 4 *G*. 4. 508

6. Testator devises a portion of his lands to his daughters *E.* and *A.*, to be equally divided between them at his death, and wills that at their respective deaths their respective shares shall be equally divided between their several and respective children; but if *A.* dies without issue, then he gives her share to *E.* for life, and at her decease to her children, share and share alike. He then gives to all his grand-children, who shall be living twelve months after his death, 5*l.* each. The residue of his real and personal estate he gives to his only son *B.*; but if he dies without issue, then he gives his share of the estate to all the grand-children who should be then living, share and share alike. Then he introduces certain qualifications respecting the devises he had so made, and for the first time mentions any of his grand-children by name. First, he directs, that such of these last shares as should belong to his grand-daughter *E. S.* should be placed in the hands of her father *W. O.*, his executors or assigns, the interest to be paid her during her life, and at her death the principal to be divided among her children, share and share alike. Next, he specifically directs, that such share or shares of the land he had devised to his daughters *E.* and *A.*, and likewise such share or shares of money, as might become due by virtue of the will to his grandson and grand-daughter *Robert* and *Hannah* (children of his daughter *E.*), should be placed in the hands of their brother *James*, his heirs or assigns, to pay the rents, &c. to them during their lives, and, after their death, his or her respective shares to be equally divided among his or her children, if such there are; if not, such shares to become the property of *his or her heirs or assigns for ever.* Nevertheless, if the brother *James* should at any time thereafter think right and proper, he might deliver up to *Robert*, *at any sooner period, all or any part of his share or*

shares, unto his only proper use, his heirs and assigns for ever:—Held, that if the disposing part of the will did not give an estate in fee to testator's daughters *E.* and *A.*, and their children, yet it was clear from the qualifying parts that such was his intention, and consequently that the children of *E.* (*A.* having died without issue) took an estate in fee in the land so devised to their mother. *Doe*, d. *Orpe* v. *Frost*, 4 *G.* 4. *Page* 678

See DISCONTINUANCE.

DISCONTINUANCE.

Discontinuance can only be created by a person who is tenant in tail in possession, at the time he does the act to defeat the settlement; therefore, where a marriage settlement conveyed an estate to trustees in trust for the joint lives of *A.* and his wife, and the life of the survivor; remainder to the use of trustees and their heirs for the joint lives of *A.* and his wife, and the life of the survivor, to preserve contingent remainders; remainder to the use of one of the trustees, his executors and administrators, for five hundred years, to raise a sum of money for the younger children of the marriage, by sale or mortgage of the estate; remainder to the use of the heirs of the body of *A.*, begotten on the body of his wife; and remainder to the use of *A.*, his heirs and assigns for ever; and *A.*, during the continuance of his life estate, granted a lease of the estate for three lives, with livery of seisin to *B.*:—Held, that this did not work a discontinuance of the settlement in tail, the intermediate estate to the trustees being vested. *Doe, Jones* v. *Jones*, 4 *G.* 4. *Page* 373

See APPRENTICE.

DISTRESS.

Case, is a good form of action for an excessive distress for rent, though the tenant has tendered the rent to his landlord before the distress is levied. *Branscomb* v. *Brydges*, 3 *G.* 4. 256

See CONSTABLE.—PRIVILEGE.

DUTY.

See ATTORNEY, 2.—POST HORSE DUTY, 1.

EJECTMENT.

1. Service of a declaration in ejectment on the servant of the tenant in possession, with a subsequent acknowledgment from the attorney of the latter, that the declaration had been received, is sufficient for judgment nisi against the casual ejector. *Doe* v. *Suce*, 3 *G.* 4. 5
2. Service of declaration in ejectment by leaving it with the daughter of the tenant in possession (who was confined by indisposition) with an affidavit that the daughter acknowledged the receipt of the declaration, and that she had read it over and explained it to her mother before the essoign day of the term, sufficient for a rule nisi for judgment against the casual ejector. *Doe* v. *Roe*, 3 *G.* 4. 12
3. Service of the declaration in ejectment upon the wife of the tenant in possession, without stating that it was served at the husband's house, or on the premises, insufficient to support a rule for judgment against the casual ejector. *Right* v. *Wrong*. 84
4. After judgment in ejectment had been signed in the year 1763, in

which year the Court of Chancery granted an injunction to stay execution, and nothing appeared to have been done in the cause since, this Court refused to enlarge the term in the declaration, for the purpose of enabling a descendant of the original plaintiff to sue out a scire facias, in order to revive the judgment, and take out a writ of possession against the heir at law of the original defendant. *Bradney* v. *Hasselden*, 3 *G.* 4. *Page* 227

5. By the practice of this Court, the plaintiff in ejectment is not entitled to sign judgment against the casual ejector, until after the postea is brought in on the day in banc; but where, after verdict, by default of defendant, the plaintiff sued out a writ of possession on the 6th *November*, without producing the postea, and executed it on the 12th, without any objection on the part of the defendant, until afterwards, the Court refused to set aside the writ, it appearing that the defendant had sustained no prejudice, and said, that if he had, that was matter of reference to the Master. *Davis* v. *Williams*, 3 *G.* 4. 229

6. Service of the declaration in ejectment upon the servant on a *Saturday*, with an acknowledgment by the tenant on a *Sunday*, insufficient for judgment against the casual ejector. *Goodtitle*, d. *Mortimer* v. *Notitle*, 3 *G.* 4. 232

7. Where a lessor of the plaintiff dies after the commission day at the assizes, and is nonsuited upon the merits of the ejectment, his executor is not liable for the costs under the common consent rule given by the testator in his life-time. *Doe*, d. *Payne* v. *Grundy*, 4 *G.* 4. *Page* 437

8. *A.* enters into an agreement with *B.* to sell land then in the possession of the latter, on certain terms, and to execute a conveyance in case *A.* should be found owner thereof, and could make a good title thereto, and agrees, that in the mean time *B.* shall remain in possession. *A.* afterwards brings ejectment against *B.* to try the title, but not having demanded possession or otherwise determined *B.*'s tenancy:—Held, that the action was not maintainable. *Doe*, d. *Newby* v. *Jackson*, 4 *G.* 4. 514

9. Landlord enters into an agreement with tenant, on 2d *January*, 1815, to grant the latter a lease for eight years of certain premises, the agreement to take effect from the 10th *October*, 1814, from which time tenant had been in possession, yielding 2*s.* 6*d.* yearly, and in case he held over after the term, he was to pay 40*s.* per diem for every day he retained possession. The lease was never granted. At the expiration of the term, tenant held over, after having been served with a nine months notice, to quit at the end of the year for which he held, which should first happen after the expiration of half a year, from the date of the notice. He was then served with a written demand of possession, and the same paper notified to him, that if he did not yield quiet possession, an ejectment would be brought:—Held, 1. That the tenant was not to be treated as a tenant from year to year; and 2. That the demand of possession was sufficient notice within 1 *Geo.* 4. c. 87, so as to entitle

the plaintiff to the benefit of the undertaking and security required by that statute. *Doe*, d. *Anglesey* v. *Roe*, 4 *G.* 4. *Page* 565

10. The time within which the undertaking and security required to be given by 1 *Geo.* 4. c. 87, shall be given, is to be fixed *by the Court at the time* the rule under that statute is to be granted. *Doe*, d. *Anglesey* v. *Brown*, 4 *G.* 4. 688

11. Tenant dies intestate, in possession of certain premises. His widow, after continuing to occupy for several years, paying rent to the landlord, marries a second time, and her husband enters into possession and pays rent for several years to the landlord, and upon the death of the wife, the personal representative of the first husband obtains administration of his estate and effects, and brings ejectment to evict the second husband:—Held, that the action was maintainable without giving a formal notice to quit. *Doe* v. *Bradbury*, 4 *G.* 4. 706

12. The statute 59 *Geo.* 3. c. 12. s. 17, empowers churchwardens and overseers to take lands and hereditaments, in the nature of a body corporate, and declares that in all actions brought in respect thereof, it shall be sufficient to name the churchwardens and overseers for the time being, describing them as the churchwardens and overseers of the poor of the parish for which they shall act, and naming such parish. Where a declaration in ejectment by churchwardens and overseers, contained two sets of counts, one describing them by their *office*, without their *names*, and the other by their *names*, without their *office*:—Held, after verdict, the objection, if any, was cured. *Doe* v. *Harpur*, 4 *G.* 4. *Page* 708

See Certiorari, 3.—Clergy.—Devise, 1, 2, 4, 6.—Discontinuance.—Lease.—Rent.

ELECTION.

See Corporation. — Court of Requests.

EMANCIPATION.

See Settlement, 2.

ERROR.

See Bail, 5, 6.—Certiorari, 2. Supersedeas.—Writ of Error, 1, 2.

EVIDENCE.

In an action against three defendants, as partners, the office copy of an answer to a bill in *Chancery*, filed by one against the others, is admissible evidence, without producing the original, in order to establish the partnership; and to prove the identity of the defendants, the clerk of their solicitor is a competent witness to that fact, though he knows nothing of the defendants but from his intercourse with them professionally in the conduct of the suit in *Chancery*. *Studdy* v. *Sanders*, 4 *G.* 4. 347

See Attorney, 1.—Bill of Exchange, 1, 2, 4.—Bribery.—Highway, 1.— Infant, 1.— Limitations. — Paying Money into Court.—Poor, 1.— Replevin, 2. — Sett-Off. — Tithes, 2. — Trespass, 1.— Warranty.—Witness.

EXCISE.

By statute 23 *Geo.* 3. c. 70. s. 34, any action or suit against any person or persons, for any matter or thing *done by* any officer or officers of excise, or any others acting in his or their aid, must be commenced within three

months next after the cause of action. *Semble*, that this section extends to the officers themselves and others acting in their aid. At all events, an action against officers of excise, &c. not brought within the time limited, is barred by 28 *Geo.* 3. c. 37. s. 23, which extends to any action against any person or persons for any thing by him or them done in pursuance of any act or acts relating to the revenues of customs and excise. *Hendry* v. *Biers*, 3 *G.* 4. *Page* 9

EXECUTION.

See Bail, 5. — Constable. — Ejectment, 4.—Practice.—Trover.—Writ of Error, 1.

EXECUTOR.

See Administrators. — Ejectment, 7.

FELONY.

See Habeas Corpus, 1. — Prisoner.

FINE.

See Corporation.

FISHERY.

See Infant, 1.

FOREIGN ATTACHMENT.

A sum of money directed to be paid by *A.* to *B.* by the award of an arbitrator, cannot be attached in *A.*'s hands by process out of the Sheriff's Court of the City of *London*, at the suit of a creditor of *B.*; therefore where a rule nisi had been obtained against *A.* in this Court for contempt, in not paying money pursuant to an award:—Held, that it was no ground for opposing a rule for attachment, that by the process of the Sheriff's Court the money was attached in his hands to answer the debt of *B.*'s creditors. *Caila* v. *Elgood*, 3 *G.* 4. *Page* 193

FRAUDS, STATUTE OF.

The traveller of a mercantile house in *London* received an order from a country manufacturer for a cask of cream of tartar, and also an offer to purchase two chests of lac dye at a given price. The traveller undertook to send both articles, but stipulated, on the part of his principals, that they should be at liberty to refuse to fulfil the contract as to the lac dye on the terms proposed, by writing to the vendee to that effect by return of post, or the post following. No answer was sent back; but shortly afterwards the goods were delivered. The vendee accepted the cream of tartar, but renounced the lac dye:—Held, that this was not an acceptance to take the case out of the statute of frauds, and render the vendee liable for the lac dye, the contract not being entire. *Price* v. *Lea*, 3 *G.* 4. 295

FRAUDULENT PREFERENCE.

If a person in trade pays a sum of money to one of his creditors, and his affairs are in such a state, that he may reasonably believe bankruptcy probable, but not inevitable, at the time he makes such payment, it is fraudulent within the meaning of the bankrupt laws, and if bankruptcy afterwards ensues, the assignees may maintain assumpsit for money had and received to their use against the person to whom such voluntary payment has been made, though the cause of action arises before the actual bankruptcy. There-

fore where *A*. paid *B*. and others his bankers, on the 14th *December*, a sum of money which he owed them, as the balance of his account, and on the 15th was arrested, and went to prison and committed an act of bankruptcy by lying there for two months:—Held, that his assignees might recover back the money so paid, though at the time of the payment he did not apprehend bankruptcy. *Poland* v. *Glyn*, 3 *G*. 4. *Page* 310

GAME.

A conviction on the statute 5 *Ann*, c. 14. s. 4, for keeping and using a gun to kill and destroy game without being qualified, must be made within three lunar months after the offence is committed. *Rex* v. *Bellamy*, 4 *G*. 4. 727

GAMING.

See Bankrupt, 3.

GAMING HOUSE.

Keeping and maintaining a common gaming house, and for lucre and gain, causing and procuring idle and evil-disposed persons to come there to play together, at "rouge et noir," and permitting such persons to play at such game for large sums of money, is an offence indictable at common law. *Rex* v. *Rogier and another*, 4 *G*. 4. 431

See New Trial.

GRANTOR AND GRANTEE.

See Copyhold.

GUARANTY.

A. writes orders to *B*. for the delivery of goods to *C*., which are accordingly delivered to the latter upon the credit of the former. The usual credit of the trade is four months, and the bills of parcels are made out in the name of *C*. The period of credit is enlarged from time to time without the knowledge of *A*.; and *C*. becoming bankrupt, *B*. proves the amount of the goods under the commission, which exceeds more than two-fifths of *C*.'s debts, and signs his certificate without any communication with *A*., who at the time of the bankruptcy is abroad, and does not return to this country until eight years afterwards:—Held, that *A*. was still liable as surety for *C*. to *B*. *Langdale* v. *Parry*, 4 *G*. 4. *Page* 337

2. By letter of credit, merchants in *London* agree to accept at *ninety days* sight the drafts of a merchant, at *Demerara*, on receiving the bills of lading, &c. of certain colonial produce, to be remitted, and add, "on receiving these documents, and *no irregularity appearing*, we shall accept your drafts at the *usual date*, to the extent of 30,000*l*." In pursuance of this agreement two several cargoes are remitted in different ships, and shortly afterwards the consignor draws a bill at *six months*, upon the credit of the cargoes remitted, and in the bill, directed the same "to be charged to account as advised," without specifying to the account of which cargo it is to be placed, and the consignees refusing to accept:—Held, that they were liable upon their agreement in damages for not accepting. *Laing* v. *Barclay*, 4 *G*. 4. 530

See Broker.

GUARDIAN.

See Infant, 1, 2.—Overseer, 2. Poor, 1.

HABEAS CORPUS.

1. Where prisoners taken into custody after an engagement at sea

between a revenue cutter and a vessel suspected to be a smuggler, of which the prisoners were the crew, were delivered on board a king's ship, and detained for fourteen days without any warrant, and were afterwards brought up by habeas corpus, to be discharged, and it appearing from the return, that there was cause to suspect them of a felony, the Court refused a discharge, and directed them to be committed to the custody of the Marshal of the Marshalsea, in order that they might be taken before a competent tribunal to be dealt with according to law. *Ex parte Krans*, 4 *G*. 4. *Page* 411

2. The habeas corpus cum causâ does not lie to remove the proceedings from an inferior jurisdiction into this Court, unless it appears that the defendant is actually or virtually in the custody of the Court below. *Mitchell* v. *Mitchinham*, 4 *G*. 4. 722

See CERTIORARI, 3.—PRIVILEGE.

HIGHWAY.

1. An order made by Justices of Peace under statute 55 *Geo.* 3. c. 68. s. 2, for stopping up an old highway, and setting out a new one, must shew that it is made with the consent in writing under the hand and seal *of the owner of the land through which the new highway is proposed to be made.* Where an order, made under this statute, recited that the Justices had received evidence of the consent of *T. J.* Esq. *in his life-time,* to the new road being carried through his lands, by writing under his hand and seal, and it appeared that another person was owner of the land at the time the order was made:—Held, that such order was insufficient, and could not be carried into execution. *Rex* v. *The Justices of Denbighshire*, 3 *G*. 4. *Page* 52

2. Whether a rector who lets his tithes by parol to the occupiers of the lands in respect of which the tithes arise, and receives a half-yearly composition in the nature of rent, can be treated as an *occupier* of tithes, within the meaning of the General Highway Act, 13 *Geo.* 3. c. 78. s. 34, and rated to the highways in the parish? *Rex* v. *The Justices of Buckinghamshire*, 4 *G*. 4. 689

See AWARD, 3.—CASE, 2.—CERTIORARI, 2.

HOUSEHOLDER.

See COURT OF REQUESTS.—OVERSEER, 1.

HUNDRED.

An action does not lie upon the Black Act, 9 *Geo.* 1. c. 22. s. 7, against two of the inhabitants of the hundred by name. It must be brought against the inhabitants at large; and this is an objection in arrest of judgment. *Jackson* v. *Pearson*, 4 *G*. 4. 439

INCLOSURE ACT.

A *ditch* is a *fence* within the meaning of the General Inclosure Act, 41 *Geo.* 3. c. 109. Therefore where the issue was, whether a certain allotment was bounded by a sufficient *fence* within the meaning of a local Inclosure Act, which required that the allotments "should be *enclosed and fenced* on all such parts and sides as should not be directed to be fenced by any other proprietor, or as should not adjoin to any enclosed land, or be bounded by any river or *other sufficient fence,*" and the proof was, that part of the locus in quo was bounded by an old deep ditch:—Held, that

INDEMNITY BOND.

INDICTMENT.

INFANT.

INHABITANTS.

INSURANCE.

IRELAND.

IRREGULARITY.

JOINDER OF PARTIES.

JUDGMENT.

JURISDICTION.

JUSTICE OF PEACE.

offender refuses to discover his name, or the name of the owner of the cart, &c. he is subjected to a like penalty, and may, without warrant, be apprehended forthwith by the person seeing the offence committed. Where the driver of a waggon committed an offence within this act, in the view of a Justice, and having placed himself before the board on which his master's name was painted, so as to prevent the discovery of the owner, and the Justice, in order to ascertain the name, stopped the horses, and laid hands on the driver, and removed him from his position before the board, and thereby informed himself of the ownership:—Held, on demurrer, that this was a trespass, and gave the driver a right of action. *Jones* v. *Owen*, 4 *G.* 4. *Page* 600

3. In a case where Justices have reasonable ground for doubting their jurisdiction, the Court will not compel them to do an act which may subject them to an action. *Rex* v. *The Justices of Buckinghamshire*, 4 *G.* 4. 689

See Bastardy, 1.—Constable. Habeas Corpus, 1.—Highway, 1.—Overseer, 2.—Prisoner.—Smugglers.

JUSTIFICATION.

See Bail, 2. 7.—Constable.—Justice of the Peace, 2.—Right of Way.

LANDLORD AND TENANT.

See Assumpsit.—Distress.—Ejectment, 9. 11.—Paying Money into Court.—Rent. Right of Way.—Tithes, 1. Trespass, 2.—Trover.

LEASE.

By marriage settlement, husband has the wife's estate for life, with power to grant leases for twenty-one years, but no longer. In breach of the power he grants a lease to *A.* for ninety-nine years, determinable upon lives. Wife survives him and conveys the fee to *B.* and in the conveyance is recited, the lease to *A.* who is recognized as then being tenant in possession of the estate at the yearly rent reserved. *B.* brings ejectment against the assignees of the lease:—Held, that the lease being void, and the recital being only matter of description, no demand of possession was necessary to sustain the action. *Doe*, d. *Biggs* v. *White*, 4 *G.* 4. *Page* 716

See Covenant, 3.—Ejectment, 9.—Power.

LIEN.

A town agent has no lien for the general balance due to him from a country attorney, upon the money of a client of the latter, coming to his hands in a cause in which he acts as the town agent. But *quære*, whether he has not a lien for his agency in recovering the money in the particular cause. *Moody* v. *Spencer*, 3 *G.* 4. 6

LIMITATIONS, STATUTE OF.

Assumpsit upon a joint promissory note made by *A.* and *B.* whilst *B.* was sole, against *A. B.* and *C.* the husband of the latter, who was joined for conformity. Plea, actio non accrevit infra sex annos. Replication, that the cause of action arose within six years, and issue thereon:—Held, that an acknowledgment by *A.* within six years, that the debt was due, would not

take the case out of the statute of Limitations, *B.* and *C.* being married at the time the acknowledgment was made. *Pittam* v. *Foster*, 4 *G.* 4. *Page* 363

See Devise, 2.

LONDON.

See Foreign Attachment.

LORD'S ACT.

A prisoner, in execution, at the suit of a creditor, whose debt exceeds 300*l.*, is not liable to be brought up under the compulsory clauses of the *Lord's Act*, 33 *G.* 3. c. 5, to make an assignment of his estate and effects. *Barker* v. *Slater*, 3 *G.* 4. 165

MANDAMUS.

See Bye-Laws. — Charter. — Corporation, 1. 3.—Manor, 1, 2.—Overseer, 2.—Replevin, 1.—Sewers.

MANOR.

1. The bailiffs and burgesses of an ancient borough had been time immemorially lords of the manor and owners of the Guildhall within the borough, and by a charter of *P.* and *M.* power was granted to them to hold manor courts in the Guildhall twice in every year, as of ancient time; and until 1807, such courts had been time immemorially held. In 1807, commissioners under an inclosure act, awarded to Lord *H.* all the said manor, with the rights, members, courts, view of frankpledge, *excepting to the bailiffs and burgesses the Guildhall, &c.* and until 1821, Lord *H.* held courts in the Guildhall, and being then obstructed, *Semble*, that mandamus would lie to the bailiffs and burgesses to compel them to allow the manor courts to be held in the Guildhall. *Rex* v. *The Borough of Ilchester*, 4 *G.* 4. *Page* 724
2. Where, by the custom of a manor, persons not being previously customary tenants, or not dwelling in the manor, purchasing by surrender customary lands within the manor, were liable to pay a larger fine to the lord than tenants or inhabitants; and a person not being a tenant or inhabitant had purchased the equity of redemption in a customary estate, and in order to save the larger fine due in respect thereof, had subsequently become the purchaser of a smaller estate, the Court granted a mandamus to the lord and steward to admit him to the latter, and as the return did not allege any act of fraud in the transaction, the mandamus was made peremptory, although the effect of admittance to the smaller estate would be to defeat the lord's claim to the fine due upon the larger estate first purchased. *Rex* v. *Meer and Forton*, 4 *G.* 4. 824

See Baron and Feme, 2.—Charter.—Copyhold.—Toll.

MARRIAGE PROMISE.

See Affidavit of Debt, 1.—Pleading, 1.

MARSHAL.

A prisoner in custody for a contempt is not entitled to the *rules* of the *King's Bench* prison, but where the Marshal, in consequence of a surgeon's certificate that a prisoner in his custody for a contempt in not paying money pursuant to the Master's allocatur, was dangerously ill, and would die if closely confined, allowed the prisoner the rules until he got better, and afterwards

confined him again within the walls, the Court refused to proceed against the Marshal by ordering him to pay the money for the non-payment of which the prisoner was in contempt, and dismissed the application, with costs. *Hall* v. *Arnold*, 4 *G.* 4. *Page* 709

See CERTIORARI, 1. — HABEAS CORPUS, 1.

MASTER.

See APPRENTICE.—ATTORNEY, 6. EJECTMENT, 5.—WITNESS.

MINES.

See ASSUMPSIT.

MISDEMEANOUR.

See NEW TRIAL.

MORTGAGE.

See ADMINISTRATORS.—SHIP.

NEW TRIAL.

Semble, that the consent of the counsel for the prosecution cannot dispense with the rule which requires the presence of defendants convicted upon a criminal proceeding, during a motion for a new trial. *Rex* v. *Fielder*, 3 *G.* 4. 46

NONSUIT.

1. Where a defendant on two successive trials of the same cause of action had obtained a verdict, the Court set aside the last verdict, and entered a nonsuit, in order that the plaintiff who claimed title to the property, which savoured of the realty, might not be for ever concluded from agitating his right. *Lee* v. *Shore*, 3 *G.* 4. 198
2. After verdict found for the defendant, the Court will, in its discretion, order a nonsuit to be entered, in order that the plaintiff may not be precluded from bringing another action. *Hodgson* v. *Forster*, 3 *G.* 4. *Page* 221

See BRIBERY. — EJECTMENT, 7.

NOTICE.

See AGENT, 2.—BAIL, 5.—BASTARDY, 2.—CLERGY.—EJECTMENT, 9.—SUPERSEDEAS.

NOTICE OF ACTION.

See JUSTICE OF PEACE, 1.

NOTICE OF DISHONOR.

See BILL OF EXCHANGE, 3, 4.—BROKER.

OFFICE.

See CORPORATION, 1, 3.—COSTS. COURT OF REQUESTS.—JUSTICE OF PEACE, 1.—OVERSEER, 1.

ORDER OF SESSIONS.

See BASTARDY, 1.—HIGHWAY, 1.

OVERSEER.

1. A person occupying a house in one parish by means of a clerk only, and paying rent, rates, and taxes, but sleeping in another parish, is a *substantial householder*, and liable to serve the office of overseer of the poor in the first mentioned parish. *Rex* v. *Poynder*, 3 *G.* 4. 258
2. By statute 23 *Geo.* 3, regulating the affairs of the poor of *Birmingham*, the guardians and overseers thereby appointed, are directed to adjust their accounts at quarterly meetings of their own body; and an appeal is given to the Sessions in respect of all matters done by virtue thereof; but the statute is silent as to any submission of the overseers and guardians accounts to magistrates, as required by 50 *Geo.* 3. c. 49.—

Held, however, that mandamus would lie from this Court to the guardians and overseers to pass their accounts in the manner required by that statute. *Rex* v. *The Justices of Warwickshire*, 3 *G*. 4. *Page* 299

See EJECTMENT, 12.—POOR, 2.

PALACE COURT.

See PRIVILEGE.

PARTNERSHIP.

1. *F*. sold goods to *H. S*. and *P*. partners in trade, and received a bill of exchange for the amount, payable to his own order, drawn by *S*. and *P*. upon *H*., which was not accepted. *H. S*. and *P*. dissolved partnership before the bill became due, and at the time of the dissolution had sufficient assets to pay all partnership debts. *S*. and *P*. then entered into a fresh partnership with two other persons, and carried on trade at *Newfoundland*, where the old firm had an establishment, and were there possessed of considerable property, which was sold to the new firm. *F*., the holder of the bill, delivered it to *P*., to procure payment of it out of the assets of the old firm at *Newfoundland*, and *P*., in the adjustment of partnership accounts with *H*., expressly debited the latter with the amount of the bill, as having been paid out of the funds of the old firm, but the bill which was never cancelled was returned again to *F*., who sued *H. S*. and *P*. upon it. *S*. and *P*., who had in the mean time become bankrupts, suffered judgment by default:—Held, that *F*. had not so dealt with his debt as to discharge *H*.'s liability. *Featherstone* v. *Hunt*, 3 *G*. 4. 233

2. Where one of two partners in trade had, after an act of bankruptcy, accepted a bill of exchange in the name of the firm, without the privity of his co-partner:—Held, that in the hands of an innocent indorsee it was an available security. *Lacy* v. *Woolcott*, 4 *G*. 4. *Page* 458

See ASSIGNEES.—BANKERS, 2.—BANKRUPT, 1.—BILL OF EXCHANGE, 2.—COURT OF REQUESTS.—EVIDENCE.

PAYING MONEY INTO COURT.

Payment of money into Court upon a special contract, admits the contract, and concludes the defendant from impeaching its existence. Where a declaration by landlord against tenant averred, that defendant became tenant to plaintiff of certain messuages, &c. from year to year, under a certain rent, payable half yearly, and that defendant undertook and promised that he would, during the continuance of the tenancy, keep the messuages, &c. in repair, and would, during the continuance of the said tenancy, pay rent; and alleged as breaches, in the first count, that the premises were not kept in tenantable repair; and in the second, first, non repair; and, second, non-payment of rent; and the defendant having pleaded the general issue, and paid into Court half a year's rent *under the second breach*:—Held, that such payment admitted the whole of the contract:—Held also, that a stamp agreement for a lease for seventeen years and a half of the premises in question, to which the plaintiff was no party, but made between defendant and other persons, from whom

plaintiff derived title to the premises, was admissible in evidence to prove the defendant's promise to keep the messuages in repair. *Dyer* v. *Ashton*, 3 *G*. 4. *Page* 19

See ARREST, 4.

PLEA.

Plaintiff declared de bene esse, and defendant pleaded in abatement before he had put in and perfected special bail; and the plaintiff, treating his plea as a nullity, signed interlocutory judgment, which was held regular. *Saunders* v. *Owen*, 3 *G*. 4. 252

See AGREEMENT.—BANKERS; 2. REPLEVIN, 2.—RIGHT OF WAY. TENDER.

PLEADING.

1. After verdict in an action for a breach of promise of marriage by a gentleman against a lady, a count, alleging a promise on the part of defendant to marry plaintiff within a reasonable time after the request, and averring "that plaintiff, confiding in the promise, had always remained unmarried, and was still ready and willing to marry defendant, and that although a reasonable time for defendant to marry him had elapsed, yet defendant, not regarding her promise, did not, nor would, within such reasonable time, marry the plaintiff, but had hitherto wholly neglected and refused so to do," is sufficient, without averring that defendant had any notice of plaintiff being ready to marry her during the reasonable time alleged, or averring any request made to defendant to marry plaintiff, or any averment of a special refusal to marry him. *Seymour* v. *Gartside*, 3 *G*. 4. 55

2. Where defendant, sued by bill, had by rule, "until two days before the *essoign* day of the Term" to plead, and the essoign day fell on a *Monday*, and defendant not having pleaded on the *Saturday*, plaintiff signed judgment as for want of a plea, the Court refused to set aside the judgment for irregularity. *Buckmaster* v. *Macmahon*, 4 *G*. 4. *Page* 538

3. Cause of action arose on the 29th *January*, being the first day of the *fourth* year of the reign of *Geo*. 4, and declaration was entitled, "*Saturday* next after fifteen days of *St. Hilary*, in *Hilary* Term, in the *third* year of king *George* the Fourth," which would be 1st *February*, in the *fourth* year of the reign:—Held, on demurrer, that the declaration was properly entitled, though plaintiff appeared, in terms, to have commenced his action before the cause had arisen. *Law* v. *Pugh*, 4 *G*. 4. 868

See ADMINISTRATION.—APPRENTICE.—BILL OF EXCHANGE, 2. 4. COVENANT, 1, 2.—PAYING MONEY INTO COURT.—POOR, 1.—PROMISSORY NOTE, 1.—REPLEVIN, 2.—SHAM PLEADING. TENDER.—TOLL.—TRESPASS, 3.

POOR.

1. An acting guardian of the poor is liable to the penalties of the statute 55 *Geo*. 3. c. 137. s. 6, for supplying the poor of the parish with provisions, though there be no proof of his appointment. If a parish officer is liable to the penalties imposed by 22 *Geo*. 3. c. 82. s. 42, still he may be proceeded against under the general act 55 *Geo*. 3. c. 137, without regard to the former statute. Where the declaration alleged

that the defendant was a person having the providing for, ordering, management, control, and direction of the poor of the parish of *W.*, and that he had supplied the poor of the parish with provisions; and it appearing that *W.* was one of five united parishes, whose poor were jointly maintained by all the parishes in one common workhouse:—Held, that the offence was well laid. *Semble*, that the declaration need not have alleged that the provisions were supplied "for the use of the *workhouse*," in order to bring the case within the statute. *West* v. *Andrews*, 3 *G.* 4. *Page* 184

2. By a local act of 3 *Geo.* 3, for regulating the affairs of a parish, the churchwardens and overseers for the time being were directed to meet annually at *Easter* to nominate and appoint twenty discreet vestrymen, who, together with the churchwardens and overseers, were to be, and be called *governors and directors* of the poor. By a subsequent act 13 *Geo.* 3. the same mode of nominating and appointing twenty discreet vestrymen was to be adopted; and it was further enacted that they, together with the churchwardens and overseers, and all persons seised of land, &c. within the parish of the annual value of £80 shall be, and be called governors and directors of the poor; and by another act 53 *G.* 3. reciting the previous acts, it was enacted that the churchwardens, &c. and thirty-two vestrymen by name, and their successors, to be nominated and appointed in the manner directed by the recited acts, should be the *governors and directors*:—Held, that this latter act virtually repealed the former acts; and that a governor and director by estate, within the meaning of 13 *G.* 3, who supplied the poor of the parish with provisions, was not liable to the penalties of 55 *G.* 3. c. 137. s. 6. *Stanley* v. *Dodd*, 4 *G.* 4. *Page* 309

See Overseer, 1, 2.—Settlement, 1, 2.

POOR RATE.

1. Where firs and larches were planted with oak and ash trees, principally for the purpose of affording a screen or shelter to the latter in their infancy, and were cut from time to time as the oaks and ashes required more room to spread, and when once cut did not spring again, and although, when sold, they yielded a profit:—Held, that they were not *saleable underwood* within the statute 43 *Eliz.* c. 2, and therefore not rateable to the relief of the poor. *Qu.* Whether under any circumstances firs and larches can be considered underwood? *Rex* v. *The Inhabitants of Ferrybridge*, 4 *G.* 4. 634

2. Where a corporation, consisting of a mayor, aldermen, and twenty-four capital burgesses, was seised in fee of certain pasture lands, and appointed a ranger to keep the keys of the gates, cleanse the ditches, preserve the fences, impound cattle trespassing, &c.; and by a court of orders and decrees, regulations were annually made concerning the right of common to be exercised by the freemen as to the number of their cattle to be turned on, the time to be turned on, and the price to be paid for each head, which price was always paid by the freemen exercising the right, to the treasurer of the corporation, and which

money, after deducting the expence of management, was distributed among the poorer burgesses, who had no cattle to depasture:—Held, that the corporation were liable to be rated to the poor, as occupiers of the land in question, within the meaning of 43 *Eliz.* c. 2. *Rex* v. *The Borough of Sudbury*, 1 *G.* 4. *Page* 651

3. The profits arising from the sale of gas manufactured from coal, and conveyed through pipes and trunks under the pavement, for the purpose of lighting a town, are not rateable to the relief of the poor under the 43 *Eliz.* c. 2. *Rex* v. *The Birmingham Gas Light and Coke Company*, 4 *G.* 4. 735

4. A Canal Company are rateable to the relief of the poor in each and every parish through which their canal passes, as occupiers of land covered with water. *Rex* v. *The Trent and Mersey Canal Company*, 4 *G.* 4. 752

5. Where the owner of a river navigation, running through fourteen different parishes, was rated to the poor of the fourteenth parish (in which the profits arising from the whole navigation were received) in respect of the whole amount of the profits:—Held, that the rate was too high, and ought to have been apportioned among all the parishes through which the navigation passed. *Rex* v. *Palmer*, 4 *G.* 4. 793

6. The proprietors of a river navigation are rateable to the relief of the poor in a parish through which the navigation passes (though no riverage dues are received in such parish) in proportion to their profits upon the whole line of navigation. *Rex* v. *The Earl of Portmore*, 4 *G.* 4. *Page* 798

See APPEAL.—PRIVILEGE, 2.

POST HORSE DUTY.

1. Horses hired merely for the pleasure and recreation of the rider, are not liable to the duties imposed by the 44 *Geo.* 3. c. 98, and 1 *Geo.* 4. c. 88. *Ramsden* v. *Gibbs*, 4 *G.* 4. 617

2. A composition for saddle horses under the assessed tax act, 59 *Geo.* 3. c. 51, does not protect the owner of such horses from liability to pay the duty imposed by 1 *Geo.* 4. c. 88. s. 3, where the same horses are let to hire to be used in travelling. *Ramsden* v. *Hodgkinson*, 4 *G.* 4. 625

POWER.

An act of parliament granted to tenant for life a power of making leases for any period not exceeding ninety-nine years, "*so as every such lease be made to take effect either in possession, or immediately after the determination of the leases then subsisting*, thereof, respectively; and so as in every such lease there be reserved to be payable, during the term thereby granted, *the best and most beneficial yearly rent* or rents, to be incident to the immediate reversion of the premises, *that can be reasonably had at the time of making such lease*, without taking any fine, forfeit, foregift, &c." When this power was granted, the estate was let upon leases, which would expire on the 10th *October*, 1791. The tenant for life, in pursuance of one entire bargain, granted at one and the same time, two leases of the premises, one dated 29th *May*, 1787, for thirty years, to

commence on the 10th *October*, 1791, and the other dated 4th *June*, for sixty-three years, to commence 10th *October*, 1821:— Held, that the last-mentioned lease was a fraud upon the power, not being made to take effect immediately after the expiration of the subsisting lease.

In the first of these two leases a yearly rent of £270 was reserved, and, in the second, a rent of £120, the grantor stipulating in the latter that the tenant should rebuild the premises either before the expiration of the term first demised, or during the first year of the second demise:— Held, that supposing these rents to be the most beneficial which could be obtained, as between lessor and lessee, still they were not so as between tenant for life and the reversioner, and consequently the power was also, in this instance, violated. *Doe*, d. *Sir R. Sutton* v. *Harvey*, 4 *G.* 4. *Page* 589

See Charter. — Devise, 1. — Lease.

PRACTICE.

1. A fi. fa. and a ca. sâ. may issue at the same time against the goods, and the person of a defendant. *Primrose* v. *Gibson*, 3 *G.* 4. 193
2. Second writ of sci. fa. against bail, not having lain in the sheriff's office four whole days, *exclusive* of the day on which it was lodged, the return day, and an intervening *Sunday*:—Held irregular. *Dicas* v. *Perry*, 4 *G.* 4. 869

See Arrest, 1, 2, 3, 4.—Assumpsit.—Attorney, 1.—Bail, 1, 2, 3, 4, 7.—Baron and Feme, 1.—Ejectment, 4, 5, 6, 7.—Nonsuit.—Plea.—Pleading, 2, 3.—Privilege.—Stamp.—Writ of Error, 2.

PRINCIPAL AND AGENT.

See Bill of Exchange, 3.— Frauds.

PRISONER.

A person under examination before Justices of the Peace, on a charge of felony, has no right to have a legal adviser attending on his behalf, still less to cross-examine the witnesses for the prosecution, and to examine opposing testimony to prove his innocence. The privilege, when allowed, is entirely a matter of discretion in the Justices.

Where an attorney of this Court was retained by a prisoner, charged with felony, to attend and give him his advice and assistance during his examination before Justices, and after notice to the latter that he attended upon such retainer for that purpose:—Held, that the Justices might forcibly turn him out of the Justice-room, and exclude his presence during the investigation of the case. *Quære*, whether this rule applies where the decision of the Justices is final, as on conviction under penal statutes, no appeal being given? *Cox* v. *Coleridge*, 3 *G.* 4. *Page* 86

See Certiorari, 1. — Habeas Corpus, 1.—Lord's Act.

PRIVILEGE.

1. One of the yeomen of the King's guard had been arrested in the *Palace Court*, and by habeas corpus cum causâ removed the case into this Court, and had put in and perfected bail upon the habeas:— Held, that the bail could not be exonerated, even supposing the defendant privileged from arrest. *Surd* v. *Forrest*, 3 *G.* 4. 250

2. Where a *British*-born subject, employed as first chorister at the *Portuguese* Ambassador's chapel, with a salary, rented and occupied a house, and let part of it in lodgings, and a distress was levied on his goods for a poor rate:—Held, that his goods were not protected by 7 *Ann.* c. 12, assuming him to be a domestic servant of the ambassador. *Novello* v. *Toogood*, 4 *G.* 4. *Page* 833

See PRISONER.

PROCESS.

See ATTORNEY, 5.—FOREIGN ATTACHMENT.

PROCHEIN AMY.

See INFANT, 2.

PROMISSORY NOTE.

1. Declaration upon a promissory note made in *Ireland*, alleging that it was made payable at No. 81, *Dame Street, Dublin*, for sterling money, without going on to aver that *Dublin* is in *Ireland*, and that the money for which the note is given is *Irish* currency, is insufficient. *Sproule* v. *Legge*, 3 *G.* 4. 15
2. A promissory note made in *Scotland*, is within the statute 3 & 4 *Ann.* c. 9, and may be sued upon in *England*. *Milne* v. *Graham*, 3 *G.* 4. 293

See BANKERS, 2.—LIMITATIONS.—VENUE.

QUO WARRANTO.

See CORPORATION, 2.—COSTS.—COURT OF REQUESTS.

RATE.

See CONSTABLE.—HIGHWAY.—RECTOR.

RECTOR.

See HIGHWAY.

REGISTRY ACTS.

An agreement inter partes for the sale of the share of a vessel, with a present interest therein, though the purchase-money is to be paid, with interest at a future time, is void within the 26 *Geo.* 3. c. 60. s. 17, and the 34 *Geo.* 3. c. 68. s. 14, for not reciting therein the certificate of the ship's registry. *Biddell* v. *Leeder*, 4 *G.* 4. *Page* 499

See SHIP.

RENT.

Demand of rent due from lessee to lessor, though made of a stranger, if made upon the land, is a sufficient demand, and need not be general, to sustain ejectment for a forfeiture for non-payment of rent, being lawfully demanded. *Doe*, d. *Brook* v. *Brydges*, 3 *G.* 4. 29

See ASSUMPSIT.—COVENANT, 4.—DISTRESS.—INFANT, 1.—POWER.—SETTLEMENT, 1.—TITHES, 1.

REPLEVIN.

1. Where a sheriff or his deputy neglects to enter a plaint in replevin, in the County Court, for damage feasant, this Court will not compel him to do so on motion. *Ex parte Boyle*, 3 *G.* 4. 13
2. Declaration in debt by the assignee of a surety bond in replevin, set out the condition, which was, that "if *B.* appeared at the then next county court, and there prosecuted his suit without delay against *I.* the bond to be void;" averment "that *B.* did not appear, &c." Plea, first non est factum, and issue thereon; second, "that *B.* did appear and prosecute, &c.;" and third, "that *B.* did appear at the then next County Court and prosecute, &c. and which said suit *is still depending and undetermined.*" Re-

plication to the second and third pleas, traversing the appearance and prosecuting of the suit, but not traversing the allegation that the suit was *still depending and undetermined*, and issue on the replication: — Held, on these pleadings, that an agreement, (which was made a rule of this Court) between plaintiff and the principal to stay all proceedings in the replevin, upon payment by the latter of a certain sum of money, each party to pay his own costs, was admissible evidence to negative the allegation in the third plea, that the suit was still *depending and undetermined*, and that the surety was not discharged by such agreement, after breach by the principal, but was liable for such sum as appeared upon a reference to be due. *Hallett* v. *Mountstephen*, 4 G. 4. *Page* 343

See TITHES, 1.

RIGHT OF WAY.

To trespass quare clausum fregit, the defendant justified, a right of way over the locus in quo in the *occupiers* of premises adjacent thereto, and it being proved that he was seised of the premises, in respect of which the right of way was claimed, and *occupied* only by means of a tenant to whom the premises were demised:—Held, that he was an *occupier* to sustain the plea of justification pleaded. *Hollis* v. *Proud*, 3 G. 4. 31

RULE OF COURT.

See WARRANT OF ATTORNEY.

SALE.

On the 11th of *September* defendant entered into a contract for the purchase of 1100 bushels of wheat, the bought-note, stating that the corn was sold "according to sample, and that it should be paid for in bankers' bills, if required." The usage of the market (*Bristol*), was, to sell by sample, *subject to the buyer's inspection and approval of the bulk.* On the 19th *September* defendant applied to see the bulk, but was told by plaintiff that he would either send for a bushel on the spot or would send him a load home the next day for his inspection, but that he could not shew him the bulk, as it was in another warehouse, and "he did not like to let him into his connexions." In a few days afterwards plaintiff sent to defendant to inform him that the wheat was ready for delivery on producing banker's bills. In the mean time the market had fallen, and the defendant repudiated the contract: — Held, that he was not liable in an action for the breach. *Lorimer* v. *Smith*, 3 G. 4. *Page* 23

See BANKRUPT, 2. — CASE, 3.— SHIP.—VENDOR AND VENDEE.

SCIRE FACIAS.

See BAIL, 1.—EJECTMENT, 4.— PRACTICE, 2.

SCOTLAND.

See INFANT, 1. — PROMISSORY NOTE, 2.

SERVANT.

See AMBASSADOR.—CASE, 1.

SERVICE.

See ATTORNEY, 6. — BAIL, 7.— EJECTMENT, 1, 2, 3, 6.

SESSIONS.

See APPEAL. — BASTARDY, 1.— CERTIORARI, 2. — COUNTY TREASURER.—HIGHWAY, 1.— OVERSEER, 2.—TITHES, 2.

SETTLEMENT.

1. Where a person rented and resided on a tenement of 9*l.* 10*s.*

a-year, and during the same time contracted by the year for two ponds, or for the rushes and flags growing therein (he being by business a chair-bottomer), the owner of the ponds reserving to himself the use of the water as he thought proper, the rent agreed for being 5*s.* a-year for one pond, and 5*s.* and two door mats of the value of 2*s.* for the other:—*Held*, that he thereby acquired a settlement. *Rex* v. *The Inhabitants of All Saints in Cambridge*, 3 *G.* 4. *Page* 47

2. Where a minor enlisted into the Royal Marines, and having been discharged from the service at the end of the war, before he attained twenty-one, returned to his father's family:—*Held*, that he was not emancipated. *Rex* v. *The Inhabitants of Rotherfield Greys*, 4 *G.* 4. 628

3. Renting a house, and letting part of it off to a lodger is holding a separate and distinct dwelling-house within the statute 59 *G.* 3. c. 50, so as to confer a settlement. A *tenement*, within the meaning of that statute, may consist of house and land taken at different times and of different persons, provided the *whole* annual rent amounts to 10*l.* and the land and house be in the same parish. *Rex* v. *The Inhabitants of North Collingham*, 4 *G.* 4. 743

4. At the end of a year's service in the parish of *N.*, a master being about to remove into the parish of *B.* said to his servant, "would you like to go with me thither?" Servant said, "he had no objection." Master replied, "I fear you are scarcely strong enough for the work there, but try." The servant went into *B.* and after serving his master for six weeks, the latter asked him what wages he expected; to which he answered, "what you please." The master then said he would give him the same as the year before, with which he was satisfied and remained in the service until *Michaelmas*, minus ten days; for which period the master deducted a proportionate amount of wages:—*Held*, that this was a conditional hiring, and conferred a settlement on the servant. *Rex* v. *The Inhabitants of Northwold*, 4 *G.* 4. *Page* 790

5. A pauper was hired as a labourer in husbandry, to serve a farmer under an agreement that he was to have yearly wages, and his master either to find him two cows, or provide himself with two, *and feed them on his master's farm.* The pauper bought one cow, and his master found him another, both of which were fed during the summer in his master's pasture, and, in the winter, were kept in his master's straw yard, and fed with hay grown upon the farm. The pasture and the hay feeding were respectively worth 5*l.* 5*s.* a-year: *Held*, that the pauper did not gain a settlement by renting a tenement of 10*l.* value. *Aliter* if the contract had been that the cows were to be *pasture fed.* *Rex* v. *The Inhabitants of Sutton Saint Edmunds*, 4 *G.* 4. 800

6. A testator charged his manor and lands with an annuity of 20*l.* to be paid by trustees to a parish schoolmaster to be nominated by the person or persons who, for the time being, should be entitled to the possession of the manor. In pursuance of the will, a schoolmaster was appointed, and received the annuity for seven years, during which time

he had possession of a house (rent free, but worth 10*l.* a year), which was assigned to him as his residence in the character of schoolmaster:—Held, that such residence gained him a settlement within 13 & 14 *Car.* 2, though by the terms of the will he was liable at any time to be dismissed from the office of schoolmaster, at the will and pleasure of the donor. *Rex* v. *The Inhabitants of Lakenheath*, 4 *G.* 4. *Page* 816

7. A parish apprentice bound for nine years, having served for six, asked his mistress leave to go into another service, to which she consented, saying she was not against it if he could better himself. He then hired himself as a yearly servant to a master in another parish, and informed his mistress of the fact, to which she said, "Very well, I am not against it." In a few days he went to his new place, and in about a fortnight returned to his mistress for his clothes, who said she hoped he liked his new place, and he said he did:—Held, that this was not such a consent on the part of the mistress as would give the pauper a settlement under the indenture in the parish where the new master resided. *Rex* v. *The Inhabitants of Whitchurch*, 4 *G.* 4. 845

SET-OFF.

On non assumpsit pleaded, and notice of set-off given to an action for goods sold and delivered, a witness was called to prove a conversation with plaintiff, in which the latter began by proposing to refer the matters in dispute between him and defendant to the arbitration of witness; but this being refused, plaintiff proceeded to admit that he had received on account of defendant 800*l.*, a sum more than covering the demand in the action:—Held, that this conversation was receivable in evidence under the notice of set-off, and ought not to be rejected as an offer of compromise, although plaintiff expressly requested the witness to state the conversation to defendant, to induce him to come to a compromise. *Thomson* v. *Austen*, 4 *G.* 4. *Page* 358

SEWERS.

Where the owner of marsh lands was bound by the custom of a sewage level to repair the sea walls fronting his own estate, and by an extraordinary flood tide the wall was damaged, the Court refused a mandamus to the Commissioners of Sewers to re-imburse him for the expence of the repairs, it appearing by affidavit that the wall had been previously presented for irrepair, and was out of repair at the time the accident happened. *Rex* v. *The Commissioners of Sewers in Essex*, 1 *G.* 4. 700

SHAM PLEADING.

To a declaration for use and occupation, the defendant pleaded, "that after the making of the promises, and after the accruing of the causes of action mentioned in the declaration, and before the exhibiting plaintiff's bill, defendant delivered to plaintiff one ton weight of *Riga* hemp, and one hundred weight of *Russia* tallow, of the value of 30*l.*, in full satisfaction and discharge, and that plaintiff had accepted the same of defendant in full satisfaction and discharge, &c." On affidavit that this plea was in every re-

spect false, the Court allowed plaintiff to sign judgment as for want of a plea. *Richley* v. *Proone*, 4 G. 4. *Page* 661

SHERIFF.

See Bail. 1.—Bankrupt, 1, 2.—Case, 3. —Practice, 2.—Replevin, 1.—Trover.

SHERIFF'S COURT.

See Foreign Attachment.

SHIP.

Sole owner of a ship secretly mortgages three-fourth shares in her, as a security for a debt due to a creditor, and he is allowed by the latter to retain the sole possession, management and control of the vessel, until he becomes bankrupt, and though the requisites of the registry acts had been complied with:—Held, that the whole vessel passed to the assignees under the statute 21 *Jac.* 1. c. 19. s 11, and that trover would lie against the mortgagee, who had taken possession of the ship upon the bankruptcy. *Kirkley* v. *Hodgson*, 4 G. 4. 818

See Registry Acts.

SMUGGLERS.

The statute 57 *Geo.* 3. c. 87. s. 5. enacts, that when any person offending against the same, or any other act relating to the customs or excise, shall be arrested, he is to be conveyed before one or more Justices of the Peace, "*residing near to the port or place into which the smuggling vessel is carried or near to the place where any such person shall be so taken or arrested.*" Where two persons were apprehended in a smuggling boat, under this act, whilst afloat in the port of *F.*, which had an exclusive local jurisdiction, and after being taken on shore and detained two days there, were carried on board again and conveyed into another port, where they were convicted by justices of another jurisdiction. *Semble*, that such conviction was illegal.

If by the same statute justices of one local jurisdiction have authority to convict for an offence committed within another, such authority must appear upon the face of the conviction. Therefore, where Justices of the port of *D.* convicted for an offence committed in the port of *F.*, which had an exclusive jurisdiction, without shewing on the face of the conviction that they had authority to do so, the conviction was quashed. *Ex parte Kite*, 3 G. 4. *Page* 212

STAKEHOLDER.

A. takes from the *Board of Works* a piece of ground in *Westminster* for the erection of galleries at the king's coronation, and underlets part of it to *B.* on the same terms. The rent is paid by *B.* to *A.*, who deposits it in the hands of his bankers, with a condition that if the coronation does not take place, and the rent is in consequence remitted by the *Board of Works*, the money is to be returned to *B.* The coronation does take place, but in consequence of the speculation being unprofitable to the parties, the *Board of Works* remits the whole rent to *A.*, who refuses to return the money paid him by *B.*:—Held, that *B.* might maintain assumpsit for money had and received against the bankers as

stakeholders. *Truscott and others* v. *Marsh and others*, 4 *G*. 4. *Page* 712

STAMP.

Bailable process cannot be made returnable so as to pass over a Term, but if a writ be sued out in *Trinity*, it may be made returnable on the last return of *Michaelmas* Term. Where a writ sued out in *Trinity* was afterwards twice re-sealed, and the return altered to the last day of *Michaelmas* Term, without a fresh stamp:—Held, that the writ not having been used until the defendant was arrested was regular, and need not have been renewed. *Durdon* v. *Hammond*, 3 *G*. 4. 211

STATUTES—CITED OR COMMENTED ON.

STAYING PROCEEDINGS.

After the acceptor of a bill of exchange has offered to pay the

debt and the costs of the action against himself, the plaintiff, who was an attorney and indorsee of the bill, brought another action against the drawer, who was his own client, the Court stayed the proceedings, upon payment of the debt and the costs of one action only. *Hodson* v. *Gunn*, 3 *G*. 4. *Page* 57

See Arrest, 4.—Writ of Error, 2.

SUPERSEDEAS.

A writ of error is no supersedeas of execution, unless bail in error be put in, and notice thereof given within the time limited by the rules of the Court. *Attenbury* v. *Smith*, M. 1821. 85

See Writ of Error, 1.

TAXES.

See Post Horse Duty, 2.

TENDER.

Defendant tendered seven sovereigns in payment of a demand of 6*l*. 17*s*. 6*d*., and said to plaintiff, "there, take your demand;" and at the same time delivered a counter claim upon plaintiff of 1*l*. 5*s*.; and plaintiff said, "you must go to my attorney:"—Held, that this was not sufficient to support a plea of tender to an action brought for the 6*l*. 17*s*. 6*d*. *Brady* v. *Jones*, 3 *G*. 4. 305

See Distress.

TITHES.

1. By an inclosure act the tithes payable in respect of certain old inclosures were extinguished, and in lieu thereof a *corn rent* substituted, which was directed to be paid for ever afterwards to the impropriator and vicar, by the person who for the time being should be in possession or occupation of the land out of which the rent should be issuing; and a power of distress was given for the recovery thereof, the same as is for rent service or other rent in arrear. For several years part of such land remained untenanted and wholly unprofitable to the owner, who during that time resided elsewhere. The land was then demised to a tenant who entered and brought it into cultivation:—Held, 1. That during the time the land was untenanted and uncultivated, the landlord was in the legal possession thereof, within the meaning of the act, so as to subject him to the payment of the *corn rent* in arrear; and, 2. That the goods of the tenant, coming in under him, were liable to distress for such rent in arrear. *Newling* v. *Pearce*, 4 *G*. 4. *Page* 607
2. By 7 & 8 *W*. 3. c. 6. a summary remedy is given before two justices for the recovery of small tithes, under the value of 40*s*. [increased to 10*l*. by 53 *Geo* 3. c. 127. s. 4.]; by s. 7, which gives an appeal to the Sessions, the certiorari is taken away, "unless the *title* of the tithes should be in question;" and by s. 8, if any person complained against for subtracting tithes, should insist before two justices, upon any prescription, composition, or modus decimandi, agreement, or *title*, in order to free himself from the tithes claimed, and deliver the same in writing to the justices, subscribed by him, and should give the party complaining security, to the satisfaction of the justices, to pay all costs and damages, as upon a trial at law, to

be had for that purpose in any superior court, should be given against him; in case the prescription, &c. should not upon such trial be allowed, in such case the justices should forbear to give any judgment of the matter, and the party complaining should be at liberty to prosecute him for the subtraction in any Court in which he might have sued before the act. *Quære*, whether by this act the justices have jurisdiction to try a modus decimandi? At all events, where, after summons and appearance, two justices made an order under this statute upon a defendant to pay the value of certain small tithes, and upon the trial of an appeal against the order, the defendant then, *for the first time*, offered evidence of a modus decimandi, which was rejected:—Held, that the Sessions did right, and that if the defendant meant to avail himself of a modus as ground of defence, he was bound to submit his evidence to the two justices in the first instance. *Rex* v. *Jeffery* 4 *G*. 4. *Page* 860

See HIGHWAY.

TOLL.

To support a claim of toll traverse, a special consideration need not be shewn. Where to trespass for distraining goods brought to the market of *F*. for tolls due in respect thereof, the defendant justified the distress by shewing a prescriptive right as lord of the manor of *F*., of which the town of *F*. formed a part, to take a certain reasonable toll for goods brought within the town for the purpose of being there delivered, and in fact delivered, and averred certain special considerations for taking the toll, to which the plaintiff was no party:—Held, after verdict, that the prescriptive right of soil in the manor (the toll being coeval therewith) was a sufficient general consideration for the toll, as a toll traverse, the plaintiff having brought and delivered goods within the manor. *Rickards* v. *Bennett*, 4 *G*. 4. *Page* 389

See CANAL.

TRESPASS.

1. The stat. 16 & 17 *Car*. 2. c. 12. for making certain rivers navigable, gave the undertakers therein mentioned, power to make new cuts, &c. for the purpose of improving the navigation of such rivers, but required them to make compensation to the owners of lands, through which such cuts, &c. were to be carried, for any injury done to their property, according to the determination of commissioners, or in pursuance of agreement between the parties, but the act contained no clause giving the undertakers any power to *purchase lands*, nor did it recognize in them any right of soil in the beds or banks of the rivers intended to be made navigable. Where the river *I*., mentioned in this act, was made navigable by certain undertakers in 1702, and their successors exercised for a long series of years various acts of ownership and enjoyment of the banks by cutting bushes, &c. and had granted a lease of hatches and sluices made in one of the banks to an occupier of land adjoining thereto, for the purpose of irrigation, and there was no proof of any agreement between the undertakers and the original propric-

tors of the land for the purchase of the soil of the bank:—Held, that such an agreement could not be presumed from these acts of ownership and enjoyment when opposed to similar acts exercised by the occupier of the adjoining land, and that the act of parliament afforded strong evidence against such presumption: Held also, that evidence of acts of ownership and enjoyment exercised by the undertakers on other parts of the line of the navigation was inadmissible to shew their title to the locus in quo, unless unity of title and character between the locus in quo, and the other parts of the line of navigation, was previously established. *Hollis* v. *Goldfinch*, 4 *G.* 4. *Page* 316

2. Tenant from year to year being desirous of letting his house for a quarter, quits and leaves it locked up, with authority to his landlord to let it during his absence if opportunity should o[ffer], and for that purpose leav[es the] key with a neighbour. [No op]portunity of letting o[ccurring, and] the person who has th[e key hav]ing absconded, the land[lord en]ters by placing a ladder ag[ainst] the house, and raising the firs[t] floor window, and, after shewing the house, leaves it in the same state as before; the house is afterwards broken open by persons unknown, and some of the tenant's furniture and wearing apparel is stolen. Trespass is brought against the landlord for breaking and entering the house, and leaving it insecure, per quod tenants' furniture and wearing apparel were stolen:—Held, that a plea of leave and licence was no answer to the action. *Ancaster* v. *Milling*, 4 *G.* 4. 714

3. Where plaintiff in trespass quare clausum fregit begins by naming his own close, it is not necessary for him to new assign after a plea of liberum tenementum. Therefore in trespass for breaking and entering a certain close of plaintiff called the *Homeyard*; and plea that the said close called the *Homeyard* is the soil and freehold of defendant; and issue thereon, which is found for plaintiff:—Held, that a new assignment was unnecessary. *Cocker* v. *Crompton*, 4 *G.* 4. *Page* 719

See COMMISSIONERS.—JUSTICE OF PEACE, 2.—PRISONER.—RIGHT OF WAY.—TOLL.

TRIAL.

The affidavit to postpone a trial on the ground of the absence of a witness, need not state the name [o]f the witness suggested to be [materi]al and necessary. *Smith* [v. ...], 4 *G.* 4. 420

[See A]SSUMPSIT.

[TROVE]R.

[...] a mill is part of [...] and cannot lawfully [be removed b]y the tenant. Whe[re] [...] of a mill demised it to [...] under agreement for a [term o]f thirty years, and the [tenant] clandestinely dismantled the mill of the machinery, which, in its removal, was seized by the sheriff in execution, and sold under his authority to a boná fide purchaser:—Held, that the landlord might maintain *trover* against such purchaser, though the tenant's term was unexpired. *Farrant* v. *Thompson*, 3 *G.* 4. 1

See ASSIGNEES.—ASSUMPSIT.—BANKRUPT, 2.—BRINGING MONEY INTO COURT.—CARRIER.—DEVISE, 5.